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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Federal Communications Commission Record

Volume 7
Issue 26

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 8528

Cumulated Index to Volume 7..... 8861

Instructions for Use..... 8862

Table of Cases..... 8863

Table of FCC and Delegated Authority Numbers..... 8917

Table of Docket Numbers..... 8945

Table of Rulemaking Numbers..... 8958

Table of Localities..... 8967

Subject Index..... 8984

Federal Communications Commission Record

Table of Cases
Volume 7
Issue 26

Case Name	Page
ARMIS Filing Requirements	8795
AT&T Communications	8671
AT&T Communications	8611
Algreg Cellular Engineering	8686
Amendment of Part 80 - Revisions to Coast Guard Rules	8552
Amendment of Part 90 - Expansion of 72-76 MHz Band	8528
American Sharecom, Inc.	8536
Anacortes Yacht Charters	8588
Applications in the 220-222 MHz Band	8659
Brookings Municipal Telephone	8613
Cable Act of 1992 - Tier Buy-Through Prohibitions	8672
Cable Act of 1992 - Consumer Protection and Customer Service	8641
Cable Television Technical and Operational Requirements	8676
Citizens Utility Company	8656
Communications Fund, Inc.	8636
Decatur Telecasting, Inc.	8622
Digital Audio Radio Service Satellite Systems	8594
Emision De Radio Balmeseda, Inc.	8629
Encryption Technology for Satellite Cable Programming	8612
Giannettino, John M.	8654
Haddonfield Wireless Company	8534
Hughes Communications Galaxy, Inc.	8582
Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum	8590
Lynn Broadcasting	8563
MSS Above 1 GHz Negotiated Rulemaking Committee	8614
MicroNet, Inc.	8579
NYNEX	8633
NYNEX Telephone Companies	8606
National Exchange Carrier Association, Inc.	8554
National Exchange Carrier Association, Inc.	8604
Newspaper Association of America	8615
Open Network Architecture and Non-discrimination Safeguards	8664
Partial Waiver of the Sunshine Period Prohibition	8603
Pegasus Broadcasting, Inc.	8625
Playa Del Sol Broadcasters	8595
Provision of Access for 800 Service	8616
Radio KCCT, Inc.	8583
STARSYS Global Positioning, Inc.	8562
Skyline Broadcasters, Inc.	8652
Sprint Communications Company L.P.	8580
Standard Broadcasting, Inc.	8571
Stauffer, J.J.(Jake)	8585

Case Name	Page
TV 14, Inc.	8591
Table of Allotments, FM, Cambridge and St. Michaels, MD	8545
Table of Allotments, FM, Colfax, IL	8541
Table of Allotments, FM, Milton-Freewater, OR	8550
Table of Allotments, FM, Seaside, OR	8543
Table of Allotments, FM, Smiths, AL	8540
Table of Allotments, FM, Stillwater, OK	8548
Tel-Save, Inc.	8602
Teledial America, Inc.	8537
Teledial America, Inc.	8539
Telephone Consumer Protection Act of 1991	8752
Telephone Consumer Protection Act of 1991	8660
Telesphere Network, Inc.	8538
Toll Fraud Risks During the Year-End Holiday Season	8647
Trentadue, Scott M.	8601
United Telephone - Southeast	8658
Washington County Rural Telephone Cooperative	8631
Western Maine Cellular, Inc.	8648
Western States Broadcasting	8587

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 7
Issue 26

Delegated Authority or FCC Number	Page
DA 92 -1590	8671
DA 92 -1596	8540
DA 92 -1598	8541
DA 92 -1624	8545
DA 92 -1625	8543
DA 92 -1626	8548
DA 92 -1627	8550
DA 92 -1651	8622
DA 92 -1652	8534
DA 92 -1653	8562
DA 92 -1657	8579
DA 92 -1658	8795
DA 92 -1659	8604
DA 92 -1661	8536
DA 92 -1662	8537
DA 92 -1663	8538
DA 92 -1664	8606
DA 92 -1665	8539
DA 92 -1666	8594
DA 92 -1668	8652
DA 92 -1669	8654
DA 92 -1671	8583
DA 92 -1672	8585
DA 92 -1673	8587
DA 92 -1674	8588
DA 92 -1675	8580
DA 92 -1676	8582
DA 92 -1677	8590
DA 92 -1678	8602
DA 92 -1679	8611
DA 92 -1690	8613
DA 92 -1691	8614
DA 92 -1692	8612
DA 92 -1693	8631
DA 92 -1694	8615
DA 92 -1695	8633
DA 92 -1698	8658
DA 92 -1700	8647
DA 92 -1706	8648
DA 92 -1707	8656
DA 92 -1712	8659
DA 92 -1717	8660
FCC 92 - 443	8752
FCC 92 - 495	8664
FCC 92 - 508	8676
FCC 92 - 515	8554
FCC 92 - 521	8616
FCC 92 - 527	8625
FCC 92 - 532	8552
FCC 92 - 534	8528
FCC 92 - 536	8591
FCC 92 - 540	8672
FCC 92 - 541	8641
FCC 92 - 547	8603
FCC 92 - 548	8636
FCC 92D - 64	8686
FCC 92D - 70	8595
FCC 92R - 89	8571
FCC 92R - 90	8563
FCC 92R - 91	8601
FCC 92R - 92	8629

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 7
Issue 26

Docket Number				Page
CC	Dkt.No.86	-	10	8616
CC	Dkt.No.88	-	2	8615
CC	Dkt.No.90	-	623	8615
CC	Dkt.No.90-	-	623	8633
CC	Dkt.No.91	-	142	8686
CC	Dkt.No.92	-	90	8752
CC	Dkt.No.92	-	90	8660
CC	Dkt.No.92	-	166	8614
CC	Dkt.No.92	-	256	8664
MM	Dkt.No.85	-	38	8676
MM	Dkt.No.89	-	350	8629
MM	Dkt.No.90	-	25	8571
MM	Dkt.No.90	-	504	8595
MM	Dkt.No.91	-	84	8563
MM	Dkt.No.91	-	169	8676
MM	Dkt.No.91	-	201	8601
MM	Dkt.No.92	-	199	8540
MM	Dkt.No.92	-	261	8603
MM	Dkt.No.92	-	262	8603
MM	Dkt.No.92	-	262	8672
MM	Dkt.No.92	-	263	8603
MM	Dkt.No.92	-	263	8641
MM	Dkt.No.92	-	264	8603
MM	Dkt.No.92	-	265	8603
MM	Dkt.No.92	-	266	8603
MM	Dkt.No.92	-	290	8541
MM	Dkt.No.92	-	291	8545
MM	Dkt.No.92	-	292	8550
MM	Dkt.No.92	-	293	8548
MM	Dkt.No.92	-	294	8543
MM	Dkt.No.92	-	295	8591
MM	Dkt.No.92	-	302	8654
MM	Dkt.No.92	-	303	8652
PP	Dkt.No.92	-	234	8612
PR	Dkt.No.89	-	552	8659
PR	Dkt.No.91	-	295	8528

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 7
Issue 26

Rulemaking Number	Page
RM - 7182	8528
RM - 7985	8590
RM - 8016	8591
RM - 8050	8540
RM - 8127	8541
RM - 8128	8548
RM - 8129	8543
RM - 8133	8545
RM - 8135	8550

Table of Cases by City
Volume 7
Issue 26

City/State	Page
Anacortes, WA	8588
Atlanta, GA	8591
Augusta, GA	8625
Bellingham, WA	8534
Burlington, IA	8654
Cambridge, MD	8545
Colfax, IL	8541
Corpus Christi, TX	8583
Decatur, TX	8622
Franklin, AL	8686
Garden Grove, CA	8587
Kalispell, MT	8652
Lexington, SC	8571
Mecca, CA	8595
Milton-Freewater, OR	8550
Mt. Juliet, TN	8563
Oxford, ME	8648
Ponte Vedra Beach, FL	8629
Rome, GA	8591
Seaside, OR	8543
Smiths, AL	8540
St. Louis, MO	8636
St. Michaels, MD	8545
Stillwater, OK	8548
Washington, DC	8585
Whitewater, WI	8601

Subject Index
Volume 7
Issue 26

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Integration of ownership into management, effectuation	8563
Misrepresentation and lack of candor	8571
Orders or Notices	
Lottery to select licensee	8652, 8654
Review Board or Commission Decision	
Abuse of process	8686
Diversification of control of mass media	8595
Integration of ownership into management, quantitative	8595
Misrepresentation and lack of candor	8686, 8595
Reopening of record	8686
Broadcast Radio Services - General Rules	
Applications for authorization	
Public inspection file of commercial stations, local	8571
Licenses and permits	
Multiple ownership of broadcast stations in the same service	8625
Records kept by stations	
Equal employment opportunity program	8636
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	8545, 8543, 8548, 8550, 8540, 8541
Broadcasting - TV Stations	
Technical considerations	
Interference, protection from	8622
Transmitter location and antenna system	8622
Cable Television Service	
Markets and services	
Markets and their communities, list of major	8591
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	8579, 8580, 8582

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Commission Organization	
Common Carrier Bureau	
Functions: recommend/administer policies for services for hire	8633
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	8658, 8611, 8633
Common Carriers	
Extension of lines, certificate for	8579, 8580, 8582
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Defective applications	8534
Requirements, general application	8534
Applications and licenses, processing	
Consideration of applications, proceedings in	8534
Jurisdictional Separations Procedures	
Facilities and property	
C&WF(Category 1),apportionment procedures in exchange line	8656
Maritime Services	
Safety watches	
Ship: Bridge to Bridge Act	8552
Practice and Procedure	
Common carriers: complaints	
Formal or informal	8536, 8537, 8538, 8539
Common carriers: complaints, formal	
Supplemental complaints	8602
Ex parte presentations, general information	
Adjudicative proceedings, restricted	8603
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	8534
Rulemaking proceedings: proceedings	
Notice of Proposed Rulemaking in the Federal Register	8672
Public Mobile Service	
Domestic public cellular radio telecommunications service	
Service areas	8648
Tariffs (Schedules of Rates and Regulations)	
Rules, general	
Letters of transmittal: supporting information to be submitted	8604

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.204 delegated authority	8647
000.291 Delegated Authority	8611
000.291 Delegated Authority	8613
000.291 Delegated Authority	8658
000.291 Delegated Authority	8671
001.106 Petitions for reconsideration	8534
001.106 Petitions for reconsideration	8583
001.106 Petitions for reconsideration	8585
001.106 Petitions for Reconsideration	8587
001.106 Petitions for Reconsideration	8588
001.1203 Sunshine period prohibition	8603
001.412 Notice of Proposed Rulemaking	8672
001.711 Formal or informal complaints	8536
001.711 Formal or informal complaints	8537
001.711 Formal or informal complaints	8538
001.711 Formal or informal complaints	8539
001.727 Motions	8602
001.800 Forfeiture Provisions	8636
001.926 Application for renewal of license	8588
002.803 Equipment requiring Commission approval	8585
0076.500 Definitions	8676
021.130(c) Additional application information submission	8534
021.200(d) Dismissal for failure to timely submit informatio	8534
021.280(d) Dismissal for failure to prosecute	8534
021.320 Consideration of applications	8534
022.903 Cellular System Service Areas	8648
036.154(d) waiver request,	8656
036.380 Other Billing and Collecting Expense	8554
061.38 Supporting Information	8604
063.001 Contents of Application	8579
063.001 Contents of Application	8582
063.001 Contents of Applications	8580
064.1200(e)(2), Telephone Solicitations	8660
064.1401 Expanded Interconection	8606
064.1402 Rights and responsibilities of interconnectors	8606
068.318(c)(3), Communications Equipment	8660
069.605(c)	8631
073.1225 Station inspections by FCC	8583
073.1560 Operating power	8587
073.1820 Station log	8583
073.202 FM Table of Allotments	8540
073.202 FM Table of Allotments	8541
073.202 FM Table of Allotments	8543
073.202 FM Table of Allotments	8545
073.202 FM Table of Allotments	8548
073.202 FM Table of Allotments	8550
073.2080 Equal Employment Opportunity	8636
073.3525 Settlement	8601
073.3526 local public inspection file	8571
073.3526 Local public inspection file	8583

073.3555 Multiple ownership 8625
073.612 Protection from interference 8622
073.685 Transmitter location and antenna system 8622
076.510 Major Television Markets 8591
076.601 Performance Tests 8676
076.605 Technical Standards 8676
076.607 Resolution of Complaints 8676
080.309 Watch required by the Bridge-to-Bridge Act 8552
080.405 Station license 8588
090.175 Frequency coordination requirements 8528
090.630 Power Radio Service 8528
090.750 Business Radio Service 8528
095.651 Frequency capability 8585
300.214 Extension of Lines 8579
300.214 Extension of Lines 8580
300.214 Extension of Lines 8582
300.301 License for Radio Communication 8588
300.309 Action Upon Applications 8636
300.503 Forfeitures in Cases of Rebates and Offsets 8583
300.503 Forfeitures in Cases of Rebates and Offsets 8585
300.503 Forfeitures in Cases of Rebates and Offsets 8587
300.503 Forfeitures in Cases of Rebates and Offsets 8588
300.503 Forfeitures In Cases of Rebates and Offsets 8636
300.543 Regulation of Rates 8672
300.544 Technical Standards 8676
47 C.F.R. § 64.702, Furnishing of Enhanced Services and CPE 8615
47 CF 0.91, 0.291 8633
47 CFR Part 69 8616
47 CFR § 64.702 8664
500.100 HDO 8652
500.100 HDO 8654
500.2035 integration of ownership into management, quantitat 8595
500.2045 diversification of control of mass media 8595
500.2125 misrepresentation and lack of candor 8595
500.3040 integration of ownership into management, questions 8563
500.3125 Misrepresentation and lack of candor 8571
500.3170 financial qualifications 8563

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-295

In the Matter of

Amendment of Part 90 to Increase the Number of Frequencies in the 72-76 MHz Band for Low-Power Mobile Use — RM-7182

REPORT AND ORDER

Adopted: November 30, 1992; Released: December 14, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Section 90.257(b)(1) of the Commission's Rules, 47 C.F.R. 90.257(b)(1), to add an additional twenty frequencies in the 72-76 MHz band for low-power mobile use by eligibles in the Manufacturers, Railroad, Petroleum, Power, and Business Radio Services.[1] The additional frequencies, located in the previously-existing guard bands adjacent to a band allocated for Aeronautical Radionavigation use, will help relieve the congestion being experienced by users of the existing 72-76 MHz mobile frequencies.

II. BACKGROUND

2. The frequency band from 74.8 MHz to 75.2 MHz is allocated for Aeronautical Radionavigation use. Currently, ground-based aeronautical marker beacon transmitters operate in this band on a center frequency of 75.0 MHz with an authorized bandwidth of 6 kHz. These transmitters are used to help guide aircraft utilizing the Instrument Landing System (ILS) form of navigation in their approach path toward airport runways. For many years, 200 kHz-wide guard bands existed on each side of the 74.8-75.2 MHz band. These guard bands, located at 74.6-74.8 MHz and 75.2-75.4 MHz, were created to reduce the likelihood of interference to marker beacon signals received by aircraft. With the advent of modern-day receiver design, administrations world-wide recognized that operations in the guard bands could occur with minimal risk of interference to modern aircraft beacon receivers. Footnote 572 to the Table of Frequency Allocations in Section 2.106 of the Rules, 47 C.F.R. § 2.106, therefore, specifies that operations by other services on frequencies in the guard bands is permissible after December 31, 1989.[2]

3. In view of this provision, the Manufacturers Radio Frequency Advisory Committee Inc. (MRFAC) petitioned the Commission to channelize the guard bands and make the new frequencies available to the Manufacturers Radio Service for low-power operations. MRFAC also proposed that half of the new frequencies be designated for digital transmission applications.

Notice of Proposed Rule Making

4. In October 1991, we released a *Notice of Proposed Rule Making* (*Notice*) to examine issues related to MRFAC's petition. The *Notice* proposed to create ten 20 kHz-wide channels in each guard band for a total of 20 channels for low-power mobile use by eligibles in the Manufacturers Radio Service and to make the additional channels subject to the same rule provisions governing the current low-power 72-76 MHz mobile frequencies.[3] The *Notice* also asked for comments on whether additional protection to the aircraft marker beacon frequency is necessary and, if so, how this could be accomplished while still providing for land mobile operations in the guard bands. The *Notice* also sought information on the expected use by licensees of digital transmission techniques and whether it is necessary to limit some frequencies solely to digital use. Finally, the *Notice* asked whether other private land mobile radio services should be included in sharing these additional frequencies. Nine comments and replies were filed in response to the *Notice*.[4] The *Notice* was also coordinated with the Federal Government through the Interdepartmental Radio Advisory Committee (IRAC).[5]

III. DISCUSSION

Use of the Guard Bands

5. Honeywell, in its comments, opposed use of the guard bands for communications purposes. Honeywell argues that any use of the guard bands will degrade this safeguard to aircraft beacon operation and will result in a reduced safety of flight.[6] We, too, are concerned about potential interference to aircraft beacon operations. After analysis of the issues and comments, however, we believe that use of the guard bands is possible under controlled conditions.

6. With respect to the issue of aircraft safety, the proposals in this proceeding were coordinated with Government radio users through the IRAC. To this end, the Federal Aviation Administration (FAA) recently conducted a test program to determine the potential for interference to aircraft marker beacon receivers from land mobile transmissions on the guard band frequencies. The results in-

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[1] Section 90.257 governs the assignment and use of frequencies in the 72-76 MHz band.

[2] *See* 47 C.F.R. § 2.106 n.572.

[3] Pursuant to Section 90.257(b)(1), mobile operations in the 72-76 MHz band are permitted on a secondary basis to television reception on Channels 4 and 5. Section 90.257(b)(2) specifies a maximum mobile transmitter power of 1 watt, and that each station is authorized as a mobile station, but may be used to provide the operational functions of a base or fixed station.

[4] Comments were filed by the Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC), the Association of American Railroads (AAR), the American Petroleum Institute (API), the Utilities Telecommunications Council (UTC), the National Association of Business and Educational Radio, Inc. (NABER), H.W. Beningfield, Honeywell Inc. (Honeywell), and Phonic Ear, Inc. (Phonic Ear). Reply comments were filed by MRFAC and Phonic Ear.

[5] No opposition to the *Notice* was received from the Federal Government.

[6] Comments of Honeywell at 1.

dicated that there is a possibility of marker beacon receiver performance degradation under certain conditions. To minimize such degradation, the FAA recommended that Part 90 transmitters be limited to a maximum one watt power output, that antennas be vertically polarized, that pulse modulation be avoided, and that transmitters be located at least 2000 feet from any aircraft approach path.

7. The 74.8-75.2 MHz band allocated for beacon operations is 400 kHz wide. The beacon transmitter operates in the center of this band at 75.0 MHz with a typical authorized bandwidth of 6 kHz. This results in nearly 200 kHz of protection on each side of the beacon frequency. The adjacent guard bands of 74.6-74.8 MHz and 75.2-75.4 MHz provide an additional 200 kHz buffer on each side of the beacon frequency, resulting in almost ± 400 kHz of protection. Footnote 572 to Section 2.106 recognizes that such extensive protection is excessive because of advances in beacon receiver design and thus specified a cut-off date of December 31, 1989 for the prohibition of guard band use.[7] We conclude, therefore, that the use of improved beacon receivers can permit mobile operations on frequencies 200-400 kHz removed from the 75.0 MHz beacon frequency. To minimize the potential for interference to aircraft marker beacon receivers, however, and in accordance with the FAA's recommendations, we will limit the transmitter power to one watt and will not authorize any pulsed emissions on these frequencies.[8] Because the guard bands are shared co-equally with the Government, we will also require that all Part 90 applications for guard band frequencies be subject to normal coordination procedures through the IRAC. The FAA, through these procedures, will be given an opportunity to review each application with respect to proposed use of the frequencies near flight approach paths.

Channel Plan and Channel Use

8. We are also adopting our proposal to divide each of the two guard bands (74.6-74.8 MHz and 75.2-75.4 MHz) into ten 20-kHz wide channels, resulting in the establishment of twenty additional frequencies. MRFAC proposed that nine of the new frequencies be designated for digital transmission applications for manufacturing operations such as inventory control, bar code readers, remote control, etc. We did not propose to restrict the use of any of the additional channels to a specific modulation technique. We did, however, indicate our concern for minimizing interference between all potential operations using the new frequencies by requesting comments on expected uses and whether some frequencies should be reserved for digital transmissions.[9]

9. There was a general lack of support in the comments for digital-only frequencies. We also conclude that it is unnecessary to limit any frequencies specifically to digital use. Licensees should have the flexibility to use these frequencies in either an analog or digital mode of operation. We, therefore, are not limiting any of the new frequencies to a specific modulation technique.

Eligibility for Use of the Frequencies

10. We proposed to make the twenty additional frequencies available for low-power mobile use only by licensees in the Manufacturers Radio Service. We asked for comments, however, on whether other private land mobile radio services should be included in the sharing of these frequencies. In response, some commenters asked that we extend the use of these frequencies to other radio services.[10] After reviewing these requests, we conclude that shared use is possible because of the one-watt transmitter power limitation in the guard bands. To minimize potential interference between users, however, limitations on a licensee's area of operations will be necessary.[11] We are therefore adopting rules that permit shared low-power mobile use of the frequencies by eligibles in the Manufacturers, Business, Petroleum, Power, and Railroad Radio Services in specific types of locations applicable to each radio service.[12]

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[7] *See* 47 C.F.R. § 2.106 n.572.

[8] Section 90.257(b)(2) already limits mobile operations in the 72-76 MHz band to vertical polarization.

[9] The only comments addressing the digital issue were submitted by API, which states that because of the proposed low-power restriction and frequency coordination requirements, it is unclear why some frequencies should be reserved solely for digital use. Comments of API at 5.

[10] AAR, in its Comments at 2, states that because of the low-power nature of operations to be authorized on the new frequencies, there is no reason to limit the use of these frequencies to one radio service and that in the interest of fairness and spectrum efficiency, the Commission should permit railroads to share the new frequencies. API, in its Comments at 3 and 4, states that many petroleum and natural gas operations now use low-power mobile frequencies as a consequence of their eligibility in the Manufacturers Radio Service, and that there is a growing demand in these industries for access to additional 72-76 MHz low-power mobile frequencies for emergency and operational communications. UTC, in its Comments at 3 and 4, states that several utilities have been granted waivers to operate low-power mobile units in the 72-76 MHz band, that the new frequencies would be ideal for many utility functions, and that their use by utilities in confined areas would increase spectrum efficiency. NABER, in its Comments at 4 and 5, states that there is a need for additional low-power frequencies by businesses not eligible in the Manufacturers Radio Service, such as drive-in restaurants and department stores. NABER further argues that because all the users envisioned by the Commission for the new frequencies would be eligible in the Business Radio Service, the majority of the new frequencies should be allocated to the Business Radio Service, with a smaller number reserved for the Manufacturers Radio Service. MRFAC, in its Reply Comments at 2-6, opposes shared use of the frequencies by the Business, Power, and Petroleum Radio Services.

[11] Location limitations for the use of these frequencies will be the same as those currently listed in Section 90.79(d)(4) for the Manufacturers Radio Service and Section 90.91(c)(2) for the Railroad Radio Service. The use of the frequencies by Business Radio Service licensees will be limited to the confines of the immediate premises of the licensee's business, by Petroleum Radio Service licensees to the confines of petroleum and natural gas industry locations, and by Power Radio Service licensees to the confines of power plants, substations, etc. Specific location limitations for each radio service are listed in the rules included in the Appendix.

[12] Phonic Ear, in its Comments, proposes that the guard bands be used exclusively for auditory assistance devices or alternatively, that the frequencies be made available in the Special Emergency Radio Service with eligibility for the frequencies limited to applicants who are engaged in protecting life or property or assisting those with handicaps or limited sight or hearing. Phonic Ear emphasizes that the guard bands should not be made available for general communications by the public or

IV. CONCLUSION

11. We are designating twenty frequencies in the 74.6-74.8 MHz and 75.2-75.4 MHz bands for low-power mobile use by eligibles in the Business, Manufacturers, Petroleum, Power, and Railroad Radio Services. The frequencies will be limited for use within specific confines appropriate to each radio service and will be subject to the provisions of Section 90.257(b)(1) of the Rules which governs the use of 72-76 MHz low-power mobile frequencies. Providing additional 72-76 MHz low-power mobile frequencies for use in the Manufacturers and Railroad Radio Services will relieve the congestion presently being experienced in these services. These frequencies will also provide new spectrum for low-power applications by eligibles in the Power, Petroleum, and Business Radio Services.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

12. The Notice included a certification that the Regulatory Flexibility Act of 1980 does not apply to this proceeding because there would not be a significant economic impact upon a substantial number of small business entities. No comments were received regarding our certification.

VI. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set below, effective [thirty days after publication in the Federal Register].

14. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

15. For further information concerning this *Report and Order*, contact Eugene Thomson, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Parts 2 and 90 are amended as follows:

Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

1.The authority citation for Part 2 continues to read as follows:

Authority: Sections 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 302, 303 and 307, unless otherwise noted.

2. 47 C.F.R. § 2.106 is amended by adding entries in the FCC use designators column for the frequency bands 74.6-74.8 and 75.2-75.4 as listed in the United States table column to read as follows:

§ 2.106 Table of Frequency Allocations.

International table			United States table		FCC use designators	
			* * * * *			
(1)	(2)	(3)	(4)	(5)	(6)	(7)
			* * * * *			
74.6-74.8 FIXED MOBILE			74.6-74.8 FIXED MOBILE		PRIVATE LAND MOBILE (90)	
572 US273			572 US273			
			* * * * *			
75.2-75.4 FIXED MOBILE			75.2-75.4 FIXED MOBILE		PRIVATE LAND MOBILE (90)	
572 US273			572 US273			
			* * * * *			

Part 90 - Private Land Mobile Radio Services

3. The authority citation for Part 90 continues to read as follows:

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154, 303 and 332, unless otherwise noted.

4. 47 C.F.R. § 90.63 is amended by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77, 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to the frequency table in paragraph (c), and adding paragraph (d)(27) to read as follows:

§ 90.63 Power Radio Service.

* * * * *

(c) * * *

---

the business community at large. Phonic Ear also claims that interference-free frequencies are needed for auditory assistance devices. To provide additional spectrum for such devices, our recent decision in ET Docket No. 91-150 now permits auditory assistance devices to operate in the subject guard bands pursuant to Part 15 of the Rules. This decision will now enable auditory assistance devices to operate on an unlicensed, shared basis with other low-power systems, eliminating the interference from high-power systems currently being experienced. Phonic Ear's alternate proposal, to make the guard band frequencies available on a licensed basis to only certain eligibles in the Special Emergency Radio Service, would be difficult to implement. In view of the above reasons, we are denying Phonic Ear's specific requests.

Power Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
* * * * *		
74.61	do	27
74.63	do	27
74.65	do	27
74.67	do	27
74.69	do	27
74.71	do	27
74.73	do	27
74.75	do	27
74.77	do	27
74.79	do	27
75.21	do	27
75.23	do	27
75.25	do	27
75.27	do	27
75.29	do	27
75.31	do	27
75.33	do	27
75.35	do	27
75.37	do	27
75.39	do	27
* * * * *		

(d) * * *

(27) This frequency is available on a shared basis with the Petroleum, Business, Manufacturers, and Railroad Radio Services and interservice coordination is required. All communications on this frequency must be conducted within the boundaries or confines of a power plant, factory, liquified natural gas facility, shipyard, mine, substation, pumping station, or operations control room. Operations on this frequency are subject to the provisions of § 90.257(b). Pulsed modulations will not be authorized.

* * * * *

5. 47 C.F.R. § 90.65 is amended by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77, 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to the frequency table in paragraph (b), and adding paragraph (c)(43) to read as follows:

90.65 Petroleum Radio Service

* * * * *

(b) * * *

Petroleum Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
* * * * *		
74.61	do	43
74.63	do	43
74.65	do	43
74.67	do	43
74.69	do	43
74.71	do	43
74.73	do	43
74.75	do	43
74.77	do	43
74.79	do	43
75.21	do	43
75.23	do	43
75.25	do	43
75.27	do	43
75.29	do	43
75.31	do	43
75.33	do	43
75.35	do	43
75.37	do	43
75.39	do	43
* * * * *		

(c) * * *

(43) This frequency is available on a shared basis with the Power, Business, Manufacturers, and Railroad Radio Services and interservice coordination is required. All communications on this frequency must be conducted within the boundaries or confines of a plant, factory, or drilling platform primarily engaged in the production or refining of petroleum products (including natural gas). Operations on this frequency are subject to the provisions of § 90.257(b). Pulsed modulations will not be authorized.

* * * * *

6. 47 C.F.R. § 90.75 is amended by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77, 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to the frequency table in paragraph (b), and adding paragraph (c)(45) to read as follows:

§ 90.75 Business Radio Service.

* * * * *

(b) * * *

Business Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
* * * * *		
74.61	do	45
74.63	do	45
74.65	do	45
74.67	do	45
74.69	do	45
74.71	do	45
74.73	do	45
74.75	do	45
74.77	do	45
74.79	do	45
75.21	do	45
75.23	do	45
75.25	do	45
75.27	do	45
75.29	do	45
75.31	do	45
75.33	do	45
75.35	do	45
75.37	do	45
75.39	do	45
* * * * *		

(c) * * *

(45) This frequency is available on a shared basis with the Power, Petroleum, Manufacturers, and Railroad Radio Services and interservice coordination is required. All communications on this frequency must be conducted within the boundaries or confines of the licensee's business premises. Operations on this frequency are subject to the provisions of § 90.257(b). Pulsed modulations will not be authorized.

* * * * *

7. 47 C.F.R. § 90.79 is amended by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77, 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to the frequency table in paragraph (c), and adding paragraph (d)(28) to read as follows:

§ 90.79 Manufacturers Radio Service.

* * * * *

(c) * * *

Manufacturers Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
* * * * *		
74.61	do	28
74.63	do	28
74.65	do	28
74.67	do	28
74.69	do	28
74.71	do	28
74.73	do	28
74.75	do	28
74.77	do	28
74.79	do	28
75.21	do	28
75.23	do	28
75.25	do	28
75.27	do	28
75.29	do	28
75.31	do	28
75.33	do	28
75.35	do	28
75.37	do	28
75.39	do	28
* * * * *		

(d) * * *

(28) This frequency is available on a shared basis in the Power, Petroleum, Business, and Railroad Radio Services and interservice coordination is required. All communications on this frequency must be conducted within the boundaries or confines of a plant, factory, shipyard, mill, or other manufacturing area. All operations on this frequency are subject to the provisions of § 90.257(b). Pulsed modulations will not be authorized.

* * * * *

8. 47 C.F.R. § 90.91 is amended by adding the frequencies 74.61, 74.63, 74.65, 74.67, 74.69, 74.71, 74.73, 74.75, 74.77, 74.79, 75.21, 75.23, 75.25, 75.27, 75.29, 75.31, 75.33, 75.35, 75.37, and 75.39 MHz together with their associated class of station(s) and limitations to the frequency table in paragraph (b), and adding paragraph (c)(21) to read as follows:

§ 90.91 Railroad Radio Service.

* * * * *

(b) * * *

Railroad Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
* * * * *		
74.61	do	21
74.63	do	21
74.65	do	21
74.67	do	21
74.69	do	21
74.71	do	21
74.73	do	21
74.75	do	21
74.77	do	21
74.79	do	21
75.21	do	21
75.23	do	21
75.25	do	21
75.27	do	21
75.29	do	21
75.31	do	21
75.33	do	21
75.35	do	21
75.37	do	21
75.39	do	21
* * * * *		

(c) * * *

(21) This frequency is available on a shared basis in the Power, Petroleum, Business, and Manufacturers Radio Services and interservice coordination is required. All communications must be within the boundaries or confines of railroad terminals or yards. All operations on this frequency are subject to the provisions of § 90.257(b). Pulsed modulations will not be authorized.

* * * * *

9. 47 C.F.R. § 90.175 is amended by revising paragraph (f)(3) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(f) * * *

(3) Applications for frequencies in the 72-76 MHz band except for mobile frequencies subject to §§ 90.63(d)(27), 90.65(c)(43), 90.67(c)(34), 90.73(d)(7), 90.75(c)(45), 90.79(d)(4), 90.79(d)(28), 90.91(c)(2) and 90.91(c)(21).

* * * * *

10. 47 C.F.R. § 90.257 is amended by revising the introductory text of paragraph (b) and the first sentence in paragraph (b)(1) to read as follows:

§ 90.257 Assignment and use of frequencies in the band 72-76 MHz.

* * * * *

(b) The following criteria shall govern the authorization and use of frequencies within the 72-76 MHz band by mobile stations in the Power, Petroleum, Forest Products, Special Industrial, Business, Manufacturers, and Railroad Radio Services.

(1) Mobile operation on frequencies in the 72-76 MHz band (see §§ 90.63(c), 90.65(b), 90.67(b), 90.73(c), 90.75(b), 90.79(c), and 90.91(b)) is subject to the condition that no interference is caused to the reception of television stations operating on Channels 4 and 5. * * *

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Haddonfield Wireless Company — File No. 5289-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channels at Bellingham, Washington

ORDER ON RECONSIDERATION

Adopted: December 4, 1992; Released: December 14, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* Haddonfield Wireless Company (Haddonfield) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Bellingham, Washington, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated a qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Haddonfield was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Haddonfield was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Haddonfield was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. After requesting an extension of time, Haddonfield provided some, but not all, of the requested information. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d), the Division dismissed Haddonfield's application for failure to comply completely in a timely manner with the Division's request for information. While admitting that all of the requested information had not been submitted, Haddonfield argues that its application should be reinstated because: (1) it had negotiated with a potential customer for its proposed MMDS station; (2) it "had been reluctant to undertake a formal interference study since it would be mooted by its [prospective] move to" another transmitter site. Petition at 3.

4. *Discussion.* As of the date of the Division's dismissal action, Haddonfield still had not submitted all of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Haddonfield failed to comply with the request to submit the Section 21.902(i) ITFS interference analysis. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it.[2] Despite the specific request that this analysis be submitted by a specified date, Haddonfield failed to do so. *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991). In addition, Haddonfield failed to file an analysis concerning the possible impact upon Canadian communications, as required by Section 21.902(c)(5), and as requested in the Division's deficiency letter. *See* 47 C.F.R. Sec. 21.13(c).

5. Haddonfield had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *Vision-Aire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than 32 months substantially impeded the expeditious offering of MMDS at Bellingham. Also, Haddonfield's failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Haddonfield had not provided the required ITFS interference analysis or the required Canadian interference analysis. The Division was not in a position, therefore, to complete evaluation of Haddonfield's MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

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[1] The deficiencies cited in the letter were the absence of: (1) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); (2) correct antenna structure height information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (3) current financial qualification data, pursuant to 47 C.F.R. Sec. 21.17; (4) an analysis concerning possible impact upon Canadian communications, as required by 47 C.F.R. Sec. 21.902(c)(5); (5) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (6) sufficient tariff showing, pursuant to Item 19 of FCC Form 435 and 47 C.F.R. Sec. 21.13; (7) updated licensee qualification report, FCC Form 430; and (8) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i).

[2] Even if Haddonfield was not required to comply with the requirements of Section 21.902(i), it was required, pursuant to 47 C.F.R. Sec. 21.13(c), to file the ITFS interference analysis after the Division directed Haddonfield to do so. Section 21.13(a) provides, *inter alia*,: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

6. *Conclusion and Ordering Clause.* Having carefully considered the arguments and evidence presented, we find that dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement of the application is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Haddonfield Wireless Company regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Sharecom, Inc.,
Complainant,

v. File No. E-91-133

GTE Northwest Incorporated,
Defendant.

ORDER

Adopted: December 7, 1992; Released: December 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1991, American Sharecom, Inc. (American Sharecom) filed the above-captioned complaint against GTE Northwest Incorporated (GTE Northwest) seeking damages resulting from GTE Northwest's alleged violation of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On November 3, 1992, American Sharecom and GTE Northwest filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

GTE NORTH INCORPORATED, File No. E-89-425
Defendant.

ORDER

Adopted: December 7, 1992; Released: December 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Teledial America, Inc. (Teledial) filed the above-captioned formal complaint against GTE North Incorporated (GTE) seeking damages resulting from GTE's alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. On November 19, 1992, however, Teledial and GTE filed a joint motion for dismissal requesting that the above-captioned complaint be dismissed with prejudice. In support of their motion, the parties state that they have settled all claims in the above-captioned proceeding.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Teledial and GTE's Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK INC.,
Complainant,

v.

NEVADA BELL TELEPHONE COMPANY,
Defendant.

File No. E-90-174

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: December 7, 1992; Released: December 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 11, 1990, Telesphere Network, Inc. (Telesphere) filed the above-captioned complaint against Nevada Bell Telephone Company (Nevada Bell) seeking damages resulting from Nevada Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On November 17, 1992, Telesphere and Nevada Bell filed a joint motion to dismiss the complaint stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

5. IT IS FURTHER ORDERED that Telesphere's Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] Telesphere filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 653 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Teledial America, Inc.,
Complainant,

v. File No. E-90-269

GTE North Incorporated,
Defendant.

ORDER

Adopted: December 7, 1992; Released: December 14, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Teledial America, Inc. (Teledial) filed the above-captioned complaint against GTE North Incorporated (GTE North) seeking damages resulting from GTE North's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On November 19, 1992, Teledial and GTE North filed a joint motion to dismiss the complaint with prejudice, stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-199

In the Matter of

Amendment of Section 73.202(b), RM-8050
Table of Allotments,
FM Broadcast Stations
(Smiths, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 24, 1992; Released: December 14, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 5917 (1992), issued in response to a petition filed on behalf of Smiths Communications ("petitioner") proposing the allotment of Channel 267A to Smiths, Alabama, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal reiterating its intention to apply for Channel 267A if allotted to Smiths. No other comments were received.

2. We believe the public interest would be served by allotting Channel 267A to Smiths since it could provide a first local aural transmission service to the community. As indicated in the *Notice*, Channel 267A can be allotted to Smiths in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 7.4 kilometers (4.6 miles) southwest of the community.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **January 28, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Smiths, Alabama	267A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 267A at Smiths, Alabama, will open on **January 29, 1993,** and close on **March 1, 1993.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 267A are 32-28-42 and 85-08-06. The site restriction is required to avoid a short-spacing to the licensed site of Station WKHX-FM, Channel 268C, Marietta, Georgia, at coordinates 33-48-27 and 84-20-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-290

In the Matter of

Amendment of Section 73.202(b), RM-8127
Table of Allotments,
FM Broadcast Stations.
(Colfax, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 24, 1992; Released: December 14, 1992

Comment Date: February 4, 1993
Reply Comment Date: February 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Livingston County Broadcasters, Inc. ("petitioner") requesting the allotment of Channel 299A to Colfax, Illinois, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 299A at Colfax, Illinois, since it could provide the community with its first local FM service. Channel 299A can be allotted to Colfax in compliance with the Commission's minimum distance separation requirements at the petitioner's desired site.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Colfax, Illinois	--	299A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 4, 1993,** and reply comments on or before **February 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David D. Oxenford
Matthew P. Zinn
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1125
(Counsel for Livingston County
Broadcasters, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 299A at Colfax are North Latitude 40-33-54 and West Longitude 88-36-54.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-294

In the Matter of

Amendment of Section 73.202(b), RM-8129
Table of Allotments,
FM Broadcast Stations.
(Seaside, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1992; Released: December 14, 1992

Comment Date: February 4, 1993
Reply Comment Date: February 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ken's Corporation ("petitioner") requesting the allotment of Channel 255A to Seaside, Oregon, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 255A to Seaside, Oregon, since an interest has been expressed in providing the community with an additional local FM service. Channel 255A can be allotted to Seaside in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4 miles) southwest to avoid a short-spacing to Station KEZX-FM, Channel 255C, Seattle, Washington.[1] Canadian concurrence in the allotment is required since Seaside is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Seaside, Oregon	234A	235A,[2] 255A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 4, 1993,** and reply comments on or before **February 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret L. Tobey, Esq.
Akin, Gump, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W., Suite 400
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 255A at Seaside are North Latitude 45-59-15 and West Longitude 124-00-34.

[2] In a separate *Notice of Proposed Rule Making,* the Commission has proposed to substitute Channel 235A for Channel 234A at Seaside to accommodate the allotment of Channel 234C2 at Camas, Washington. *See* MM Docket No. 92-241, 7 FCC Rcd _____ (released October 26, 1992).

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they wili be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-291

In the Matter of

Amendment of Section 73.202(b), RM-8133
Table of Allotments,
FM Broadcast Stations.
(Cambridge and St. Michaels,
Maryland)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 25, 1992; Released: December 14, 1992

Comment Date: February 4, 1993
Reply Comment Date: February 19, 1993

By the Chief, Allocations Branch:

1. C. W. A. Broadcasting ("petitioner"), permittee of Station WFBR(FM), Channel 232A, Cambridge, Maryland, has filed a petition for rule making proposing the reallotment of Channel 232A from Cambridge to St. Michaels, Maryland, as that community's first local transmission service.[1] Petitioner also seeks modification of its construction permit (BMPH-920828JK) for Station WFBR(FM) to specify the change of community of license from Cambridge to St. Michaels, Maryland.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[2] Petitioner expresses a desire to provide a first local transmission service to St. Michaels, Maryland. Petitioner states that the allotment of Channel 232A to St. Michaels will result in a preferential arrangement of allotments. According to petitioner, Cambridge will continue to be served by Stations WCEM(AM) and WCEM(FM). Petitioner points out that Cambridge also receives service from Station WCEI(FM), Easton, Maryland, and a major part of Cambridge receives service from Station WAAI(FM), Hurlock, Maryland.

3. We believe the public interest will be served by proposing the reallotment of Channel 232A from Cambridge, Maryland, to St. Michaels, Maryland, as it would provide St. Michaels with its first local transmission service. Channel 232A can be allotted to St. Michaels, Maryland, at petitioner's proposed site in compliance with the Commission's spacing requirements.[3] Petitioner is requested to provide information regarding reception service gains and losses that would result from adoption of this proposal. Petitioner is also requested to provide any other information regarding the public interest benefits of this proposal. Channel 232A is short spaced to Channel 232A, Salisbury, Maryland, Station WICO-FM. However, Station WICO-FM was ordered to operate on Channel 248A in MM Docket 84-1043.[4] The channel substitution at Salisbury was made to accommodate the allotment of Channel 232A at Cambridge. The *Report and Order* in that proceeding indicated that the ultimate permittee of FM Channel 232A at Cambridge was responsible for reimbursement for the expenses incurred by Station WICO-FM in changing channels.[5] Petitioner is reminded that, pursuant to that *Report and Order*, it is required to reimburse Station WICO-FM, Salisbury, Maryland, for these expenses, regardless of whether this proposal is adopted. The grant of a license for Channel 232A at St. Michaels, Maryland, may be withheld pending the issuance of a license for Station WICO-FM, on Channel 248A. We shall propose to modify the construction permit for Station WFBR(FM) to change the community of license and specify operation on Channel 232A at St. Michaels, Maryland. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 232A at St. Michaels or require the petitioner to demonstrate the availability of an additional equivalent channel at that community.

4. In view of the above, we believe it would serve the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below:

	Channel No.	
City	Present	Proposed
Cambridge, Maryland	232A, 292A	292A
St. Michaels, Maryland	---	232A

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidvait verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] *See Amendment to the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *pet. for recon. granted in part*, 5 FCC Rcd 7094 (1990).

[3] The coordinates for Channel 232A at St. Michaels are 38-49-17 and 76-17-27.

[4] *See* 50 FR 34466, August 26, 1985.

[5] The construction permit for Station WFBR(FM) is conditioned on Station WICO-FM changing channels. Program tests for Station WFBR(FM) cannot commence until program tests for Station WICO-FM commence on Channel 248A. A license will not be granted for Station WFBR(FM) on Channel 232A until a license is granted for Station WICO-FM on Channel 248A.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Prettyman Broadcasting Company
Station WICO-FM
P.O. Box 909
Salisbury, Maryland 21801

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **February 4, 1993,** and reply comments on or before **February 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Charles W. Adams, Jr., President
C.W.A. Broadcasting, Inc.
35 Solomon's Island Road
Annapolis, Maryland 21401

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-293

In the Matter of

Amendment of Section 73.202(b), RM-8128
Table of Allotments,
FM Broadcast Stations.
(Stillwater, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1992; Released: December 14, 1992

Comment Date: February 4, 1993
Reply Comment Date: February 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Kenneth R. Greenwood ("petitioner") requesting the allotment of Channel 251A to Stillwater, Oklahoma, as the community's third local commercial FM channel. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 251A to Stillwater, Oklahoma, since an interest has been expressed in providing the community with an additional local FM service. Channel 251A can be allotted to Stillwater in compliance with the Commission's minimum distance separation requirements with a site restriction of 9 kilometers (6 miles) northwest to avoid a short-spacing to Station KMOD-FM, Channel 248C, and Station KVOO-FM, Channel 253C, Tulsa, Oklahoma.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Stillwater, Oklahoma	229C2, 288A	229C2, 251A, 288A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 4, 1993,** and reply comments on or before **February 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brent Weingardt, Esq.
Consultants, Inc.
4500 West Virginia Avenue, N.W.
Bethesda, Maryland 20814
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 251A at Stillwater are North Latitude 36-09-27 and North Latitude 97-09-20.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-292

In the Matter of

Amendment of Section 73.202(b), RM-8135
Table of Allotments,
FM Broadcast Stations.
(Milton-Freewater, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1992; Released: December 14, 1992

Comment Date: February 4, 1993
Reply Comment Date: February 19, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Alexandra Communications ("petitioner"), requesting the substitution of Channel 250C2 for Channel 250C3 at Milton-Freewater, Oregon, and the modification of Station KLKY(FM)'s construction permit to specify the higher class channel.[1] Petitioner failed to state its intention to apply for Channel 250C2, if allotted to Milton-Freewater and should correct this deficiency in response to this *Notice*. *See* paragraph 2 of the attached Appendix.

2. We believe the public interest would be served by proposing the substitution of Channel 250C2 for Channel 250C3 at Milton-Freewater, since it could provide the community with expanded radio service and enable Station KLKY(FM) to increase its coverage area. Channel 250C2 can be allotted to Milton-Freewater in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.8 kilometers (11 miles) northeast to accommodate petitioner's desired transmitter site.[2] As requested, we also propose to modify Station KLKY(FM)'s construction permit to specify operation on the higher class channel. In accordance with Section 1.420(g) of the Commission's rules, we will not accept competing expressions of interest in use of the channel at Milton-Freewater, Oregon, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Milton-Freewater, Oregon	250C3	250C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 4, 1993,** and reply comments on or before **February 19, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter W. Lechman
Lechman & Johnson, Inc.
16201 Trade Zone Avenue, Suite 108
Upper Marlboro, Maryland 20772
(Consultant to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] We note that petitioner's request was signed by its technical consultant and we are unable from the petition to determine if he is also a principal of the petitioner. Although a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission be signed and verified by the commenting or petitioning party and his/her address stated, unless they are represented by legal counsel. Therefore, petitioner is requested to clarify this matter and comply with the requirements of Section 1.52 in submitting its comments. Failure to do so could result in dismissal of the petition.

[2] The coordinates for Channel 250C2 at Milton-Freewater are North Latitude 45-59-04 and West Longitude 118-10-08.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Maritime Services
Rules to Implement Changes in the
Coast Guard's Rules Pertaining to
the Vessel Bridge-to-Bridge
Radiotelephone Act

ORDER

Adopted: November 30, 1992; Released: December 14, 1992

By the Commission:

I. INTRODUCTION

1. By this Order, the Commission amends Part 80 of the Rules, 47 C.F.R. Part 80, to conform to changes in the U.S. Coast Guard's Rules pertaining to vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (Bridge-to-Bridge Act).[1] First, these changes broaden the applicability of the Bridge-to-Bridge Act to include all power driven vessels 20 meters or longer. Second, they also require vessels subject to the Bridge-to-Bridge Act to be equipped with radio installations capable of operating on marine VHF channel 22A and, in certain areas, channel 67.

II. BACKGROUND

2. This action is a result of a request by the U.S. Coast Guard that the Commission implement changes in the Coast Guard's Rules concerning the Bridge-to-Bridge Act.[2] The Bridge-to-Bridge Act requires that certain vessels operating on the navigable waters of the United States be equipped with marine VHF radio installations capable of receiving and transmitting navigational safety warnings and communicating with the Coast Guard. The Coast Guard administers the VHF radiotelephone carriage requirements of the Bridge-to-Bridge Act, and the Commission prescribes regulations[3] concerning the technical and operating characteristics, including frequencies, of the required radio equipment.

III. DECISION

3. Recently, the Coast Guard changed its rules pertaining to vessels subject to the Bridge-to-Bridge Act.[4] Accordingly, we are amending Part 80 of the Commission's Rules, which implements the technical requirements for marine VHF radios used to comply with the Bridge-to-Bridge Act, to reflect these rules adopted by the Coast Guard. Currently, vessels subject to the Bridge-to-Bridge Act are required to be equipped with a radiotelephone capable of operating on the navigational frequency of 156.650 MHz (Channel 13).[5] In the Coast Guard's Final Rule, effective August 19, 1992, the Coast Guard required all vessels subject to the Bridge-to-Bridge Act to be capable of operating on the following additional frequencies: 1) 157.100 MHz (Channel 22A), and 2) for vessels navigating the waters of the lower Mississippi River, 156.375 MHz (Channel 67).[6] In addition, the Coast Guard's Final Rule also implemented a recent statutory amendment to the Bridge-to-Bridge Act[7] that broadened the applicability of the statute to include all power driven vessels 20 meters or longer.[8]

IV. PROCEDURAL MATTERS

4. Section 1.412(c) of the Commission's Rules, 47 C.F.R. § 1.412(c), provides that rule changes may be adopted without prior notice where the Commission for good cause finds that notice and comment procedures are unnecessary, so long as the basis for the good cause finding is published with the rule changes. Section 1.412(c) of the Rules reflects the requirements contained in the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(B).

5. We find that a notice and comment rule making proceeding in this matter is unnecessary. The changes to our rules merely reflect changes the Coast Guard previously made to its rules, effective August 19, 1992, pursuant to the notice and comment requirements of the APA. None of the changes to our rules are intended to create, alter, or revoke substantive rights and duties. *See United States v. United States Trucking Corp.*, 317 F.Supp. 69 (S.D.N.Y. 1970). Further, most U.S. vessels and approximately half of the foreign flag vessels subject to the Bridge-to-Bridge Act were already equipped with radio equipment in compliance with the requirements of the Coast Guard's Final Rule at the time it was adopted.[9] Therefore, the

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[1] 33 U.S.C. §§ 1201-1208 (1971).

[2] *See* letter from Philip R. Sheldon, U.S. Coast Guard, to Chief, Aviation & Marine Branch, Special Services Division, Private Radio Bureau, Federal Communications Commission (April 24, 1992).

[3] *See* Sections 80.1001-80.1023, 47 C.F.R. §§ 80.1001-80.1023.

[4] *See Final Rule, Requirement for Vessels Subject to Bridge-to-Bridge Radiotelephone Act to Carry VHF FM Channels 22A and 67* (Final Rule), 57 Fed. Reg. 14483 (1992) (amending Sections 26.03-26.04 and 26.09 of the U.S. Coast Guard's Rules, 33 C.F.R. §§ 26.03-26.04 and 26.09) .

[5] *See* Sections 80.1011-80.1013, 47 C.F.R §§ 80.1011-80.1013.

[6] *See* Final Rule, 57 Fed. Reg. at 14485. The Coast Guard adopted these changes to its rules pursuant to Section 4118 of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 523, which requires the Secretary of Transportation to issue regulations to ensure, among other things, that vessels subject to the Bridge-to-Bridge Act engage in radio communications on designated frequencies with the Coast Guard.

[7] *See* Coast Guard Authorization Act of 1991, § 16, 33 U.S.C. § 1203(a)(1) (1991). Prior to this statutory amendment, the Bridge-to-Bridge Act applied to all power driven vessels 300 gross tons and over.

[8] Because this statutory change did not alter the watch requirements for vessels subject to the Bridge-to-Bridge Act, we are also clarifying our rules to reflect that such vessels must maintain a watch on both 156.800 MHz (Channel 16) and 156.650 MHz (Channel 13).

[9] *See* Final Rule, 57 FR at 14485.

burden of compliance with the changes to our rules which implement the Final Rule is not substantial, nor do these changes add to the burden already imposed by the Coast Guard. Accordingly, we conclude that these changes constitute minor, noncontroversial amendments to the rules. Therefore, it is unnecessary to comply with the notice and comment requirements of the APA.

V. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that Part 80 of the Commission's Rules is amended as set forth below, effective thirty days after publication in the Federal Register.

7. For further information, contact Marc S. Martin, Room 5114, Private Radio Bureau, telephone 202-632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FINAL RULE

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.309 is amended by revising the first sentence to read as follows:

§ 80.309 Watch required by the Bridge-to-Bridge Act.

In addition to the watch requirement contained in Section 80.148, all vessels subject to the Bridge-to-Bridge Act must keep a watch on the designated navigational frequency. * * *

3. Section 80.1001 is amended by revising paragraph (a) to read as follows:

§ 80.1001 Applicability.

* * * * *

(a) Every power-driven vessel of 20 meters or over in length while navigating;

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4. Section 80.1011 is revised to read as follows:

§ 80.1011 Transmitter.

(a) The bridge-to-bridge transmitter must be capable of transmission of G3E emission on the navigational frequency 156.650 MHz (Channel 13) and the Coast Guard liaison frequency 157.100 MHz (Channel 22A). Additionally, the bridge-to-bridge transmitter must be capable of transmission of G3E emission on the navigational frequency of 156.375 MHz (Channel 67) while transiting any of the following waters:

(1) The lower Mississippi River from the territorial sea boundary, and within either the Southwest Pass safety fairway or the South Pass safety fairway specified in Section 166.200 of the U.S. Coast Guard's Rules, 33 C.F.R. § 166.200, to mile 242.4 AHP (Above Head of Passes) nearh)Baton Rouge;

(2) The Mississippi River-Gulf Outlet from the territorial sea boundary, and within the Mississippi River-Gulf outlet Safety Fairway specified in Section 166.200 of the U.S. Coast Guard's Ruies, 33 C.F.R. § 166.200, to that channel's junction with the Inner Harbor Navigation Canal; and

(3) The full length of the Inner Harbor Navigation Canal from its junction with the Mississippi River to that canal's entry to Lake Pontchartrain at the New Seabrook vehicular bridge.

5. Section 80.1013 is revised to read as follows:

§ 80.1013 Receiver.

The bridge-to-bridge receiver must be capable of reception of G3E emission on the navigational frequency 156.650 MHz (Channel 13) and the Coast Guard liaison frequency 157.100 MHz (Channel 22A). In addition, the bridge-to-bridge receiver must be capable of reception of G3E emission on the navigational frequency of 156.375 MHz (Channel 67) while transiting in the waters of the lower Mississippi River as described in Sections 80.1011(a)(1), (a)(2) and (a)(3) of this part.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. — AAD 91-3

Petition for Declaratory Ruling Pertaining to Interstate Common Line Allocation of Other Billing and Collecting Expense Under Parts 36 and 69 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1992; Released: December 16, 1992

By the Commission:

I. INTRODUCTION

1. This order addresses a petition for declaratory ruling filed by the National Exchange Carrier Association, Inc. ("NECA"). NECA's petition concerns the proper treatment of Other Billing and Collecting ("OB&C") expense associated with billing the federal subscriber line charge ("SLC") under Parts 36 and 69 of the Commission's rules.[1] NECA seeks a declaration that Part 36 of the Commission's rules permits local exchange carriers ("LECs") to employ a user count methodology to segregate end user common line access charge billing expense[2] subject to Section 36.380(c).[3] In addition, NECA seeks a declaration that the Common Carrier Bureau improperly applied a five percent limitation on interstate common line allocations.[4] Finally, NECA requests that it be directed to adjust its common line pool by accepting, retroactive to January 1, 1989, exchange carrier reports exceeding a five percent allocation.[5] For the reasons discussed below, we deny NECA's petition in all respects.

II. BACKGROUND

2. OB&C expenses are the costs incurred in preparing and rendering customer bills and in accounting for revenues generated by those bills.[6] Because the Commission detariffed interstate billing and collection services in 1986,[7] OB&C expenses generally are not recoverable through interstate access charges. The sole exception is the cost of billing the federal SLC, which, pursuant to Section 69.407(a) of our rules,[8] is assigned to the Common Line rate element.[9] Prior to that assignment, however, expenses associated with billing the SLC are subject to the jurisdictional separations process.

A. Separations Procedures

3. For separations purposes, OB&C expenses currently are recorded in "Category 2--Customer Services (Revenue Accounting)" under the subcategory "Other Billing and Collecting Expenses." Within the past five years, there have been three different sets of separations rules governing OB&C expenses.

4. *Old Part 67 Rules.* Prior to 1988, our separations rules were codified in Part 67. The Part 67 rules prescribed five main classifications for revenue accounting expenses: Toll Ticket Processing Expense, Local Message Processing Expense, Other Billing and Collecting Processing Expense, End User Common Line Access Charge Billing Expense, and Other Access Charge Billing Expense. The expenses were to be apportioned among the classifications "on the basis of an analysis of the hours of productive work in each classification for a representative period."[10] This method of apportionment is commonly referred to as a job function analysis. The End User Common Line Access Charge Billing Expense was then further apportioned between interstate and intrastate for states where a SLC was in place. In those states, one half of the expense was apportioned to interstate and one half to intrastate. In states with no SLC, all of the SLC expense was assigned to interstate operations.[11]

5. *Former Part 36 Rules.* A new separations manual, codified at Part 36, became effective January 1 1988, pursuant to our adoption[12] of the recommendation of a Federal State Joint Board.[13] The new Part 36 separations rules attempted to take a different approach toward OB&C expenses.

6. The Joint Board recommended that the five Revenue Accounting Expense categories be reduced to three categories: Message Processing Expense, Other Billing and Collecting Expense, and Carrier Access Charge Billing and Collecting Expense. The Joint Board proposed that the Part 67 categories of Other Billing and Collecting Processing

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[1] The federal subscriber line charge is a flat, per-line charge which recovers a portion of LEC costs apportioned to the interstate jurisdiction.

[2] "End user common line access charge" is another designation for the subscriber line charge. *See* n.1, *supra*.

[3] NECA Petition at 16, referencing 47 C.F.R. §36.380 (1991).

[4] NECA Petition at 16.

[5] *Id.*

[6] Throughout this opinion, the phrase "OB&C expenses," shall, unless otherwise indicated, be used to refer to the sum of the expenses associated with billing the SLC (subject to 47 C.F.R. §36.380(c)) and the Other Billing and Collecting Expenses allocated under 47 C.F.R. §36.380(b).

[7] *See* Detariffing of Billing and Collection Services, 102 FCC2d 1150, *recon. denied*, 1 FCCRcd 445 (1986).

[8] 47 C.F.R. §69.407(a) (1991).

[9] Interstate OB&C expenses not included in the Common Line rate element are assigned to the deregulated billing and collection category and thus are excluded from federal access charges. 47 C.F.R. § 69.407(c) (1991).

[10] Former 47 C.F.R. §67.381 (1987).

[11] Former 47 C.F.R. §67.385(a) (1987).

[12] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 2 FCC Rcd 2639 (1987) (*1987 Separations Order*).

[13] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2078 (1987) (*Joint Board Recommendation*).

Expense and End User Common Line Access Charge Billing Expense be combined into a category, Other Billing and Collecting Expense, to reflect the fact that both functions are performed by the same group of employees, making segregation of their respective costs difficult. The Joint Board Recommendation included a complex formula for apportioning the interstate expenses within the category, based upon a factor reflecting the 1984 interstate percentage.[14]

7. The Joint Board assumed that AT&T would begin to bill its own interstate customers rather than continue to rely on LECs to perform this function on its behalf. Should that circumstance occur, the Joint Board wanted to ensure that the interstate allocation of OB&C expenses would not disappear entirely but that some interstate OB&C allocation would remain to cover the costs associated with LEC billing of the federal SLC, which would-continue. Based on data submitted by LECs, the Joint Board estimated that five percent of OB&C expenses would be a reasonable allocation to cover LECs' costs of billing all users for the federal SLC. For that reason, the Joint Board recommended a five percent minimum interstate allocation,[15] which we adopted. In a subsequent order conforming our Part 69 access charge rules to the newly adopted Part 36, we reiterated that the five percent allocation was intended to provide for the costs of billing the federal SLC.[16]

8. *Current Interim Procedures.* The Part 36 rule adopted in 1987 remained in effect only during 1988. After consulting informally with the Joint Board, we rejected the formula on reconsideration.[17] We explained in our *Reconsideration Order* that the new procedures had been expected to reduce interstate assignments to reflect reduction in the amount of interstate billing and collection services performed by the LECs. Instead, the implementation of the new procedures increased interstate assignments in some cases and, moreover, the procedures were difficult to administer. We therefore referred the issue of permanent treatment of OB&C expenses to the Joint Board and requested comments and data from interested parties. On an interim basis, we reinstated a portion of the former Part 67 separations rules. We replaced Section 36.380 of the rules adopted in 1987, substituting language from portions of two former Part 67 rules, Sections 67.384 and 67.385. We "required carriers to reflect the interim reinstatement of the former Part 67 procedures in the next annual access tariff filing."[18]

9. Current Section 36.380(b) of our rules, governing allocation of expenses other than those associated with SLC billing, was taken from former Section 67.384. Former Section 67.384 required OB&C Processing Expense (which did not include expenses associated with SLC billing) to be allocated among specified services on the basis of a user count methodology. Under the user count methodology, LECs calculate the number of subscribers billed for each of five services: message toll and telegram, exchange, directory advertising, TWX, and private line.[19] OB&C expenses are then apportioned proportionately among the five services, based on the relative number of users of each service. In the case of toll service, OB&C expenses are then further apportioned between intrastate and interstate on the basis of the relative number of intrastate and interstate messages.

10. Current Section 36.380, in effect on an interim basis, does not specify a procedure for apportioning OB&C expenses to the cost of billing the SLC, prescribing only the jurisdictional split of such expenses following apportionment.[20] In allocating OB&C expenses to SLC billing, LECs are, however, still subject to our general separations rules, which, in the absence of specific allocation rules, require the application of appropriate use factors where direct assignment is not feasible.[21]

B. Subsequent Tariff Proceedings

11. *Tier 1 Tariff Filings.* In the *1989 Access Tariff Order,* the Common Carrier Bureau determined that the LECs' cost support data regarding allocation of OB&C expenses were "generally incorrect and incomplete," which caused the LECs to forecast apparently excessive amounts of OB&C expenses to be allocated to the Common Line rate element.[22] To quantify the excess, the Bureau used a benchmark comparison under which presumptively no more than five percent of the amounts forecast for total, unseparated OB&C expenses should be allocated to Common Line. This benchmark was derived from data used by the Joint Board in developing its 1987 recommendation for the new Part 36 Rules. The Bureau ordered disallowances in 25 Tier 1 carrier study areas,[23] with a total disallowance of $12.5 million.[24]

12. In 1990, the Bureau again used five percent as a benchmark guideline for evaluating the reasonableness of allocations of OB&C expenses to the Common Line element. The Bureau noted that the majority of the Tier 1 carriers allocated five percent or less of OB&C expenses to the Common Line element. Placing the burden on the carriers to support projections above the five percent allocation that the majority did not exceed, the Bureau evaluated several carriers' explanations for higher allocations before requiring disallowances totalling nearly $2.6 million in ten Tier 1 carrier study areas.[25] In 1991, only one Tier 1 carrier was subject to Common Line disallowances, in the

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[14] *Id.* at 2082-85. The formula was codified at 47 C.F.R. §36.380(b)(1) (1988) (p. 556)(superseded text).

[15] *Joint Board Recommendation,* 2 FCC Rcd at 2082-83.

[16] Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, 2 FCC Rcd 6447, 6453 (1987) (*Part 69 Conforming Order).*

[17] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 3 FCC Rcd 5518 (1988) (*Reconsideration Order).*

[18] *Reconsideration Order,* 3 FCC Rcd at 5533, n.45.

[19] 47 C.F.R. § 36.380(b) (1991). As an example, a subscriber that is billed for exchange service, message toll service, and directory advertising is "counted" three times--once for each service used.

[20] 47 C.F.R. § 36.380(c) (1991).

[21] *See* 47 C.F.R. § 36.1(c) (1991) and discussion *infra* at ¶ 17.

[22] *See* Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3677 (1989) (*1989 Access Tariff Order),* ¶367.

[23] A Tier 1 carrier is a carrier with annual operating revenues in excess of $100 million.

[24] *See also* Local Exchange Carrier Access Tariff Rate Levels, 4 FCC Rcd 5533 (1989) (*1989 Disallowance Order).*

[25] Annual 1990 Access Tariff Filings, 5 FCC Rcd 4177, 4216 and 4241, n.92. (1990) (*1990 Access Tariff Order).*

amount of $900 thousand, based upon allocation of OB&C expenses in excess of five percent to that element without adequate justification.[26]

13. *NECA Tariff Filing.* In January 1991, the Bureau rejected a NECA tariff which reflected unjustified allocations of OB&C expense in excess of five percent to the Common Line element. Citing NECA's reply to petitions against its tariff transmittal, the Bureau noted that "NECA had been using a 5 percent allocation limit until September 1990, when it began allowing pooling companies to allocate based on user count methodology." The Bureau found that NECA's single-sentence explanation of its intended change in allocation procedures was insufficient to justify an allocation of OB&C expenses above five percent to the Common Line element.[27]

14. *NECA's Petition for Declaratory Ruling.* NECA filed its petition for declaratory ruling on March 8, 1991, in response to the dissatisfaction of its members with its interpretation of the NECA Tariff Order.[28] Following the NECA Tariff Order, NECA informed its members that they would not be allowed to report OB&C expenses in excess of five percent to the Common Line pool, retroactive to February 1989.[29] NECA's members protested that action and NECA subsequently petitioned for a declaratory ruling regarding the correct allocation mechanism for OB&C expenses associated with end user common line access charge billing.

15. Numerous parties filed comments addressing NECA's petition prior to release on March 21, 1991, of our public notice establishing a comment cycle.[30] We have incorporated those comments, as well as the comments submitted pursuant to the public notice, into the record for our consideration of the issues raised by NECA's petition.[31]

III. DISCUSSION

A. Separations Issues: The User Count Methodology

16. NECA has asked us for a declaratory ruling that use of the user count methodology for allocating OB&C expenses to the cost of SLC billing complies with our separations procedures. The small telephone companies contend that the user count methodology is the most logical and supportable method of such allocation.[32] They argue that the current as well as previous rules permit allocation to the SLC on the basis of a user count methodology.[33]

17. As numerous parties point out in their comments,[34] Subpart D of our Part 36 rules prescribes no specific method for determining the portion of OB&C expenses that is attributable to the cost of billing the SLC.[35] Nonetheless, as is the case with other cost-specific rules (in Subparts B-G) that prescribe no specific apportionment procedure,[36] the specific rules are supplemented by our general separations rules in Subpart A.[37] These general rules, subject to the provisions of any specific rules, require that costs be apportioned by direct assignment where possible and that all remaining costs be apportioned based upon "the application of appropriate use factors."[38] In circumstances where the relevant Part 36 rule does not specify a particular apportionment procedure and direct assignment is not possible, a carrier's use of an inappropriate or unreasonable use factor would be inconsistent with Part 36.

18. Because the user count methodology is not a means of direct assignment, we must determine whether that methodology produces an appropriate use factor for allocating OB&C expenses to the cost of SLC billing. The prescribed application of the user count methodology currently is set forth in Section 36.380(b) of our rules, which is based on the former Part 67 rules which we readopted on an interim basis in our *Reconsideration Order*. It is, therefore, useful as a preliminary matter to examine the application of the user count methodology under Part 67.

19. NECA and its supporters argue that many carriers began using the user count methodology in 1984 for jurisdictional allocations to the cost of SLC billing, although the Part 67 separations rules in effect at that time called for apportionment on the basis of a productive work hour analysis.[39] NECA contends that the productive work analysis proved to be difficult, especially for small companies, so many LECs substituted other methods for the prescribed procedure. Because the current Part 36 interim rules reinstituted Part 67 procedures, NECA explains, small carriers believe that the user count methodology is permissible.[40]

20. NECA further argues that, because we did not reject previous tariffs reflecting allocations by a user count methodology, that method should be regarded as a means of compliance with the former Part 67 rules. According to NECA, under Part 67, cost studies reflecting a user count methodology were accepted by NECA and used in NECA's annual access tariff filings.[41] NECA and several LECs emphasize that tariffs reflecting such allocations were always allowed to go into effect until the Bureau's January 1991 order. For that reason, they argue, the user count methodology should be regarded as an established and accepted

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[26] Annual 1991 Access Tariff Filings, 6 FCC Rcd 3792, 3804-05 (1991).

[27] National Exchange Carrier Association, Inc., 6 FCC Rcd 719 (1991) (*NECA Tariff Order*).

[28] NECA Petition, Summary at i.

[29] *Id.*

[30] *Public Notice*, 6 FCC Rcd 1596 (1991).

[31] A list of commenters is attached as Appendix A.

[32] *See* Fred Williamson Comments at 3; NTCA Comments at 7.

[33] *See, e.g.*, ALLTEL Comments at 2; TDS Comments at 2-3.

[34] *See, e.g.*, Pacific Comments at 2-3; AT&T Comments at 2; Centel Comments at 4; Frederick and Warinner Comments at 2-3; SWB Comments at 1-2; CHA Comments at 1; and Ameritech Reply at 2.

[35] *See* 47 C.F.R. § 36.380(c) (1991).

[36] *See, e.g.*, 47 C.F.R. § 36.191 (1991) (no procedure specified for segregating Equal Access Equipment from all other amounts in the primary accounts); and 47 C.F.R. § 36.376 (1991) (rule requires that "All Other" category be separated into three subcategories but does not specify a procedure).

[37] The general rules are always subject to the provisions of the specific rules and are applied only in a manner consistent with the specific rules.

[38] 47 C.F.R. § 36.1(c) (1991).

[39] The productive work hour analysis was to be used for allocating revenue expenses among five categories, including End User Common Line Access Charge Billing Expense, which contained the costs associated with billing the SLC. *See* former Section 67.381(b), 47 C.F.R. § 67.381(b) (1987).

[40] NECA Petition at 6-7.

[41] *Id.*

means of allocating OB&C costs to SLC billing.[42] Several state regulatory bodies essentially concur with the small companies' arguments.[43]

21. In opposition, Pacific argues that section 36.380(b) specifically defines the services to be included in the application of a user count methodology and SLC charges are not included on that list. Pacific also points out that section 36.380(c), the subsection referencing end user common line charges (*i.e.*, the SLC), makes no mention of user counts.[44] Similarly, AT&T notes that the Commission's rules have never specified a user count methodology to allocate OB&C expenses associated with billing the SLC.[45]

22. We cannot accept NECA's argument that the user count methodology complied with Part 67 because tariffs reflecting that methodology were allowed to go into effect. Failure to reject a filed tariff does not establish the ultimate lawfulness of the rates contained in the tariff,[46] so it certainly does not provide the imprimatur of approval for the methods used in deriving those rates. NECA's attempt to construe tariff effectiveness as approval for the separations process which precedes allocation to specific tariff elements is a tenuous argument with no legal basis.[47]

23. Pacific and AT&T are correct that the user count methodology did not meet the specific apportionment requirements of the pre-1988, Part 67 procedures. Under Part 67, carriers were required to apportion OB&C expenses to End User Access Charge Billing (*i.e.*, SLC billing) on the basis of a productive work analysis. Although some of NECA's members apparently decided, on their own initiative, to substitute the user count methodology for the productive work analysis, the user count methodology did not, in fact, comply with the Part 67 rules.

24. In 1988, the Part 67 rules were replaced by new rules in Part 36, but, as discussed earlier,[48] those rules proved problematic in application, increasing the interstate assignment rather than reducing it, as both the Joint Board and we had expected.[49] Thus, when we subsequently changed our revenue accounting rules on an interim basis and reinstituted a portion of the Part 67 rules, our primary motivation was to reverse the unanticipated increases in interstate assignments. It was never our intent to expand the application of the user count methodology beyond the applications previously prescribed in Part 67 and readopted on an interim basis in Part 36.

25. Moreover, the current interim Part 36 rule governing application of the user count methodology,[50] like the former Part 67 rule on which it is based, does not provide for user counts as a means to allocate OB&C expenses associated with SLC billing. Section 36.380(b) specifically lists the services for which the user count methodology may be utilized. The SLC is not included on that list of services, suggesting that the user count methodology may not be used for allocating OB&C expenses to the cost of SLC billing.[51] Moreover, given our stated intention to reverse the increases in interstate allocations which had occurred during 1988, it would be unreasonable to conclude that we intended to allow use of a methodology which would increase interstate allocations still further.

26. Furthermore, although the productive work analysis is no longer prescribed for apportioning expenses to the SLC, those apportionments nonetheless must reflect appropriate use factors because direct assignment is not used. The user count methodology would produce an inappropriate use factor because it would cause an unreasonably high allocation of OB&C expenses to the federal SLC. Billing the federal SLC is a very minor part of LEC billing operations. The SLC is a single line item on a LEC customer's bill for local telephone service. That bill includes, in addition to billing for local service, billing for intrastate and interstate toll telephone calls. An appropriate use factor should, therefore, apportion a correspondingly minor portion of OB&C expenses to the cost of billing the federal SLC. As we discuss later in this order, the industry standard for OB&C allocations to the cost of billing the SLC is approximately five percent.

27. The user count methodology, in contrast, would assign a disproportionately high level of OB&C expenses to the cost of billing the SLC. Comments submitted in this proceeding indicate that, for a number of LECs, the user count methodology would assign 34.15 percent of total OB&C expenses to SLC billing.[52] Significantly, neither NECA nor any of its supporters has provided convincing justification for this extreme variance from the industry standard of five percent. In the absence of such justification, we regard an allocation of that extreme magnitude as evidence of the inappropriateness of the user count methodology for apportioning OB&C expenses to the cost of SLC billing.

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[42] TDS Comments at 2; NECA Reply at 5; TDS Reply at 2.

[43] *See* Michigan Staff Comments at 1 and 4-5; NYDPS Comments at 2; NARUC Comments at 8 and 12-15; IUB Reply at 3-4.

[44] Pacific Comments at 2-3.

[45] AT&T Comments at 3-4.

[46] Southern Railway Co. v. Seaboard Allied Milling Corp., 442 U.S. 443, 453-454 (1979)("The Commission's primary duty...is to make a prompt appraisal of the probable and general reasonableness and legality of the proposed schedule...rather than a detailed review of the lawfulness of each individual component of the tariff schedules....[T]he Commission simply has no time to...finally decide on the lawfulness of the rate schedule or its individual components..."); Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C.Cir. 1980), *cert. denied*, 451 U.S. 920 (1981)("The Commission merely accepted the tariff and did not rule on the lawfulness of the rates to be paid by former TELPAK customers"); and Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 240 (D.C.Cir.), *cert. denied*, 449 U.S. 1061 (1980)("Acceptance of a filing decides nothing concerning the merits of the case").

[47] Similarly, although GVNW wrote to the Commission requesting a ruling on its use of the user count methodology for OB&C allocation to the SLC, GVNW was not entitled to interpret the absence of a negative response as approval of its practice. *See* GVNW Comments at 2-3.

[48] *See* discussion, *supra*, at ¶ 8.

[49] *Reconsideration Order*, 3 FCC Rcd at 5523; *Joint Board Recommendation*, 2 FCC Rcd at 2082.

[50] 47 C.F.R. § 36.380(b) (1991).

[51] NECA appears to have been aware that the interim rules do not permit application of the user count methodology to allocate OB&C expenses to the SLC. Until September 1990, NECA refused to accept from its members Common Line pool data reflecting a user count methodology, demonstrating awareness of the Common Carrier Bureau's implementation of our policy. *See* discussion in *NECA Tariff Order*, 6 FCC Rcd at 720, citing NECA's Reply Comments in that proceeding. Neither NECA nor any of its members requested a waiver in order to employ the user count methodology for allocations to the cost of billing the federal SLC.

[52] Frederick & Warinner Comments at 5 and Attachment B.

28. The amount of OB&C expenses allocated to the cost of billing the federal SLC under a user count methodology also appears excessive in relation to the revenues generated by that charge. The total annual revenue from the federal SLC is $42.00 per residential customer line. Based upon data provided by Frederick & Warinner, under a user count methodology, their clients, several small LECs, would allocate, per customer line, approximately $8.00 of OB&C expense annually to the cost of billing the SLC.[53] Billing expense thus would consume nearly twenty percent of the total SLC revenue. Such an unreasonable result further illustrates the deficiency of the user count methodology in allocating OB&C expenses to SLC billing.

29. For all of the foregoing reasons, we find that the application of the user count methodology to allocate OB&C expenses to the cost of billing the SLC does not produce appropriate use factors and therefore does not comply with our Part 36 separations rules. We therefore deny NECA's request for a declaratory ruling that the user count methodology complies with our rules.

B. Tariff Issues: The Five Percent "Industry Standard" Guideline

30. NECA and a number of other parties argue that the Common Carrier Bureau's use of five percent as a benchmark for allocation to the Common Line tariff element was inappropriate because there is no Commission rule establishing a five percent limitation.[54] Those commenters contend that the Bureau improperly imposed a five percent limitation without following rulemaking procedures[55] and that the limitation constitutes an impermissible change in separations procedures without consultation with a Federal State Joint Board.[56]

31. NECA and several commenters argue that the five percent guideline applied by the Bureau in its tariff orders is not reliable because it was created without the benefit of small company data.[57] NECA and its supporters further contend that a five percent limitation should not be applied because it would produce a jurisdictional shift from interstate to intrastate.[58]

32. In opposition, Centel and Cincinnati Bell argue that the methodology proposed by NECA would arbitrarily shift an unreasonable level of OB&C expense from the intrastate jurisdiction to the interstate Common Line revenue requirement.[59] Cincinnati Bell states that the resultant shift would cause its Carrier Common Line and business Common Line charges to increase to noncompetitive levels.[60] CBT believes that there may be a number of reasonable methodologies but supports continued use of the five percent allocation for carriers that choose not to undertake the burden of developing alternative allocation methods. MCI argues that NECA was and is aware of Commission direction concerning the maximum amount of OB&C expense allowed for allocation to the interstate jurisdiction.[61]

33. At the outset, we observe that the alleged "jurisdictional shift" appears to be largely a result of the affected LECs' past noncompliance with our separations rules governing application of the user count methodology, under our former Part 67 rules as well as the 1988 and current Part 36 rules. If, as we have already determined, carriers were not using the correct separations procedures for allocating OB&C expenses to federal SLC billing, it would be nonsensical to allow carriers to continue the noncomplying allocation method in order to avoid a jurisdictional shift which, if it exists, would not have occurred had the LECs complied with our rules in the past. We shall, therefore, concentrate upon assessing the propriety of the five percent guideline applied by the Bureau in its tariff orders.

34. We decline to declare, as NECA would have us do, that the Common Carrier Bureau improperly employed a five percent limitation for OB&C allocations to the Common Line element. The Bureau's use of five percent as a guideline in assessing the reasonableness of allocations to the Common Line element is consistent with our stated intentions and those of the Joint Board. Both the *Joint Board Recommendation* and our *Part 69 Conforming Order* explain that five percent represents an appropriate allocation of OB&C expenses to federal SLC billing. Far from implementing a separations change, the Bureau, in its tariff orders, followed the OB&C separations allocation discussed by the Joint Board and referenced in our *Part 69 Conforming Order*. The Bureau's orders, while based upon our separations policy, do not modify our separations procedures in any respect.

35. We do not regard the Bureau's establishment of a non-binding guideline in order to assess the reasonableness of allocations underlying filed tariff rates as constituting impermissible rulemaking. The Bureau applied the five percent guideline in determining that NECA[62] had allocated unreasonable levels of OB&C expenses to the Common Line element. The Bureau's orders determined only

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[53] The difference between the 34.15 percent allocation produced by the user count methodology and a five percent allocationamounts to $6.84 per customer line of OB&C expense annually. Frederick & Warinner Comments at 5 and Attachment B. If that 29.15 percentage difference corresponds to $6.84, the total 34.15 percent allocation would be approximately $8.00 of OB&C expense annually.

[54] NECA Petition at 13; ALLTEL Comments at 3-4; Arapahoe Comments at 1; Bell Atlantic Comments at 2; Centel Comments at 2; ICORE Comments at 2; JSI Comments at 4; Lakedale Comments at 1; Michigan Staff Comments at 1 and 4; NARUC Comments at 8-10; NTCA Comments at 5-12; NYDPS Comments at 2; SWB Comments at 2; TDS Comments at 4-5; TUECA Comments at 1; USTA Comments at 2; Ameritech Reply at 2; IUB Reply at 3; NECA Reply at 10-11; NTCA Reply at 1-2.

[55] ALLTEL Comments at 3-4; Bell Atlantic Comments at 2; Centel Comments at 3; NARUC Comments at 11; NTCA Comments at 8; NECA Reply Comments at 12-13.

[56] Michigan Staff Comments at 2 and 6; NARUC Comments at 10-11; NTCA Comments at 8; NYDPS Comments at 2; TDS Comments at 4; IUB Reply at 4.

[57] NECA Petition at 12-13; ALLTEL Comments at 3-4; Arapahoe Comments at 1; NTCA Comments at 8-9; TDS Comments at 5; USTA Comments at 2; Williamson Comments at 2.

[58] NECA Petition at 55; ALLTEL Comments at 4; Arapahoe Comments at 1; CHA Comments at 2; Frederick and Warinner Comments at 5; GVNW Comments at 4; ICORE Comments at 2; JSI Comments at 4; Lakedale Comments at 1; Michigan Staff at 1-2; NARUC Comments at 11; NTCA Comments at 10-12; NYDPS Comments at 2; SWB Comments at 3; TCA Comments at 7; TDS Comments at 4; TUECA Comments at 2; USTA Comments at 2.

[59] Centel Comments at 4-6; CBT Reply at 3.

[60] Common Line element allocations would increase from 5 percent to more than 30 percent for CBT. CBT Reply at 3.

[61] MCI Comments at 1-2.

[62] And, earlier, a number of Tier 1 carriers. *See 1989 Access Tariff Order* and *1990 Access Tariff Order*.

the extent to which carriers' OB&C expenses were properly recoverable through specific tariffed interstate rates. The Bureau frequently uses non-binding benchmarks or guidelines as part of the process of evaluating rates and their underlying allocations.[63] We regard that practice as a useful tool for tariff analysis.

36. The Bureau explicitly stated that the five percent allocation was being used as a benchmark guideline and did not refuse to consider allocations above that level. On the contrary, the Bureau anticipated that carriers allocating OB&C expenses in excess of five percent to the Common Line element would attempt to demonstrate the reasonableness of their allocations, noting that those carriers must bear the burden of supporting projections above the industry standard.[64] We agree with the Bureau that a five percent allocation of OB&C expenses to the Common Line element is generally "generous"[65] and enables LECs generally to recover fully through access charges those costs reasonably associated with billing the federal SLC.

37. We cannot accept the contention that the five percent guideline used by the Bureau is unreliable because it does not reflect small company data. Parties advancing that argument do not explain why small companies should be expected to devote a greater proportion of their OB&C expenses to billing the federal SLC than Tier 1 carriers. Moreover, the Bureau did not restrict carriers to a five percent allocation if they could support projections above the industry standard.[66] NECA chose not to attempt such a showing in its tariff filing.

38. For all of the foregoing reasons, we find that the Common Carrier Bureau's use of a five percent guideline for evaluating the reasonableness of allocations of OB&C expense to the Common Line element was reasonable and consistent with our rules and decisions on the subject. We therefore decline to issue the declaratory ruling requested by NECA regarding the Bureau's actions.

C. Retroactive Relief

39. NECA has asked tht it be directed to reopen its Common Line pool retroactive to January 1, 1989.[67] Pacific argues that reopening the common line pool would, in effect, be improper retroactive ratemaking because rates for 1989 were set based on the pool data that reflected costs allocated using a Job Function Analysis.[68] TDS replies that there would be no problem with retroactive ratemaking because granting the NECA petition would not affect rates, only pool settlements.[69] NECA concurs with TDS, arguing that there is Commission precedent for retroactive opening of the Common Line Pool.[70] Other parties contend that NECA should not apply the *NECA Tariff Order* retroactively to disallow the user count methodology for periods which preceded the issuance in 1991 of the *NECA Tariff Order*.[71]

40. Because we have declined to adopt NECA's requested interpretations regarding the user count methodology and the five percent allocation guideline, retroactive adjustment of the Common Line pool to allow submission of data derived from a user count methodology is not appropriate. We therefore find that NECA's request for adjustment of its Common Line pool retroactive to 1989 should be denied.

41. Finally, we are not persuaded by contentions that NECA engaged in retroactive ratemaking by rejecting Common Line pool data for past periods produced using a user count methodology. NECA's retroactive adjustment of the Common Line pool affected only revenue-sharing arrangements among LECs and did not constitute retroactive ratemaking.[72]

IV. CONCLUSION

42. In this order, we have addressed NECA's Petition for Declaratory Ruling regarding the appropriate means of allocating OB&C expense to federal SLC billing and, correspondingly, to the Common Line element during the tariff process. We have explained that the interim separations rules currently in effect consist of a portion of the prior, pre-1988 Part 67 rules. When we reinstituted the pre-1988 rules, we did not add SLC billing to the list of services for which the user count methodology is prescribed. In addition, we have determined that the user count methodology is not an appropriate use factor for allocating OB&C expenses to SLC billing because it would produce unreasonably high allocations. We therefore concluded that use of the user count methodology for allocations to SLC billing is inconsistent with our rules and policies.

43. We have, moreover, determined that the Common Carrier Bureau's use of a five percent benchmark for allocation of OB&C expense to the Common Line element is reasonable as well as consistent with our rules and opinions. We have found that the Bureau's use of non-binding benchmarks such as the five percent guideline is a legitimate means of evaluating rates and their underlying allocations during the tariff process. Finally, in light of our substantive findings regarding the user count methodology and the five percent allocation benchmark, we have concluded that retroactive readjustment of NECA's Common Line pool would be inappropriate.

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[63] *See, e.g.*, the inside wiring benchmark comparisons used by the Bureau in the *1989 Access Tariff Order*, 4 FCC Rcd at 3646-47, and the *1990 Access Tariff Order*, 5 FCC Rcd at 4180-81.

[64] *1990 Access Tariff Order*, 5 FCC Rcd at 4216. We note that neither NECA nor any LEC has asked us to review any Bureau rulings on specific disallowances above the five percent guideline.

[65] *1989 Disallowance Order*, 4 FCC Rcd at 5547.

[66] *1990 Access Tariff Order*, 5 FCC Rcd at 4216. To the extent that statements in prior Bureau decisions might suggest that the five percent benchmark is a binding limitation, such statements are incorrect. We reiterate that the five percent figure merely represents a nonbinding guideline for tariff review purposes which carriers may exceed upon a showing of adequate justification.

[67] NECA Petition at 15-16.

[68] Pacific Comments at 3-4.

[69] TDS Reply at 3.

[70] NECA Reply at 14-15.

[71] ALLTEL Comments at 4-5; JSI Comments at 3.

[72] We have previously determined that requiring retroactive sharing of access revenues constitutes "a determination of the proper division of revenues . . . not ratemaking." Amendment of Part 69 of the Commission's Rules to Ensure Application of Access Charges to All Interstate Toll Traffic, 2 FCC Rcd 2154, 2160 (1987), n.37.

V. ORDERING CLAUSE

44. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201-205, and 220 of the Communications Act of 1934, 47 U.S.C. § 154(i), 201-205, and 220, and Section 1.2 of the Rules of the Commission, 47 C.F.R. § 1.2, that the Petition for Declaratory Ruling of the National Exchange Carrier Association, is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments:

1. ALLTEL Service Corporation ("ALLTEL")
2. American Telephone and Telegraph Company ("AT&T")
3. Anchorage Telephone Utility
4. Arapahoe Telephone Company ("Arapahoe")
5. Asotin Telephone Company, Home Telephone Company and Troy Telephone Company
6. Baca Valley Telephone
7. Beaver Creek Telephone Company
8. Bell Atlantic Telephone Companies ("Bell Atlantic")
9. Blackfoot Telephone Cooperative, Inc.
10. Bristol Bay Telephone Cooperative, Inc.
11. Canby Telephone Association
12. Cascade Utilities, Inc.
13. Cathey, Hutton & Associates Inc. ("CHA")
14. Central Telephone Company ("Centel")
15. Cheyenne River Sioux Tribe Telephone Authority
16. Churchill County Telephone & Telegraph System
17. Citizens Telephone Cooperative
18. Colton Telephone Company
19. Cordova Telephone Cooperative
20. East Ascension Telephone Co., Inc.
21. Ellensburg Telephone Company, Inc.
22. Emery County Farmers Union Telephone Association, Inc.
23. Fairbanks Municipal Utilities System
24. Farmers Mutual Telephone Company, Ltd.
25. Fidelity Telephone Co.
26. Fred Williamson & Associates, Inc.
27. Frederick & Warinner
28. Golden West Telecommunications Cooperative, Inc.
29. Gridley Telephone Co.
30. Gulf Telephone Co.
31. GVNW, Inc./Management ("GVNW")
32. Helix Telephone Company
33. ICORE, Inc. ("ICORE")
34. Illinois Consolidated Telephone Company
35. Indiantown Telephone System, Inc.
36. InterBel Telephone Cooperative, Inc.
37. John Staurulakis, Inc. ("JSI")
38. Kalona Co-operative Telephone Company
39. Ketchikan Public Utilities
40. La Jicarita Rural Telephone Cooperative
41. Lakedale Telephone Company ("Lakedale")
42. Leaf River Telephone Co.
43. MCI Telecommunications Corporation ("MCI")
44. Michigan Public Service Commission Staff ("Michigan Staff")
45. Molalla Telephone Company
46. Monitor Cooperative Telephone Co.
47. Moultrie Independent Telephone Company
48. National Association of Regulatory Utility Commissioners ("NARUC")
49. National Telephone Cooperative Association ("NTCA") (comments filed 3/21/91 and 4/19/91)
50. New York Department of Public Service ("NYDPS")
51. North-State Telephone Co.
52. Oregon Telephone Corporation
53. Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO")
54. Pacific Bell and Nevada Bell ("the Pacific Companies")
55. Pioneer Telephone Cooperative
56. Rockland Telephone Company, Inc.
57. Roggen Telephone Cooperative Co.
58. Roosevelt County Rural Telephone Cooperative, Inc.
59. Rural Telephone Company
60. Siskiyou Telephone Company
61. Southern Montana Telephone Co.
62. Southwestern Bell Telephone Company ("SWBT") (comments filed 3/18/91 and 4/19/91)
63. Stayton Cooperative Telephone Company
64. Tallon, Cheeseman and Associates, Inc. ("TCA")
65. Telephone & Data Systems, Inc. ("TDS")
66. Telephone Utilities Exchange Carrier Association ("TUECA")
67. United States Telephone Association ("USTA")
68. West River Mutual Aid Telephone Corp.
69. Yelm Telephone Company

Parties Filing Reply Comments:

1. ALLTEL
2. Ameritech Operating Companies ("Ameritech")
3. Centel
4. Cincinnati Bell Telephone Company ("CBT")
5. Iowa Utilities Board ("IUB")
6. National Exchange Carrier Association ("NECA")
7. NTCA
8. TDS

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1263 Released: December 16, 1992

REQUEST FOR DECLARATORY RULING FILED BY STARSYS GLOBAL POSITIONING, INC.

Comments or Oppositions: December 30, 1992
Replies: January 6, 1993

STARSYS Global Positioning, Inc. **File No. 33-DSS-P-90(24)**

STARSYS Global Positioning, Inc. requests a declaratory ruling that the purchase by Hughes STX of an interest in STARSYS will not affect the pendency of its above-referenced application. On September 30, 1991, ST Systems Corporation (STSC), STARSYS's Class A stockholder, sold a substantial portion of its assets to Hughes STX, a wholly-owned subsidiary of Hughes Aircraft Company. STSC retained its interest in STARSYS, but granted an option to Hughes STX to purchase the Class A STARSYS stock. Hughes STX now desires to exercise this option. Comments or oppositions regarding STARSYS's request must be filed on or before December 30, 1992, and replies are due by January 6, 1993.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-84

In re Applications of

GRADY LYNN and CAROL LYNN d/b/a LYNN BROADCASTING	File No. BPH-891011MJ
EDITH M. GELFAND	File No. BPH-891012MN
JAMAL BROADCASTING, L.P.	File No. BPH-891012MS

For Construction Permit for a
New FM Station on Channel 294A
Mt. Juliet, Tennessee

Appearances

Timothy K. Brady on behalf of Lynn Broadcasting; *Lawrence J. Moshvin* and *Robert L. Hoggarth* on behalf of Edith M. Gelfand; and *David Honig* on behalf of Jamal Broadcasting, L.P.

DECISION

Adopted: December 7, 1992; Released: December 17, 1992

By the Review Board: MARINO (Chairman) and GREENE. Board Member BLUMENTHAL concurring with Statement.

Board Member GREENE:

1. The Review Board has before it the exceptions of the captioned parties to the *Initial Decision* of Administrative Law Judge Edward J. Kuhlmann (ALJ), 7 FCC Rcd 2591 (1992), which granted the application of Jamal Broadcasting, L.P. (Jamal) for authority to construct a new FM radio station on Channel 294A at Mt. Juliet, Tennessee.[1] In so doing, the ALJ resolved financial issues specified against Jamal in its favor and found Jamal's proposal superior under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*), due to its general partner's minority status, long-term local residence and civic involvement, and slight broadcast experience. *Initial Decision*, ¶ ¶ 33-34, 44.[2] The ALJ also fully credited the integration proposals of Grady Lynn and Carol Lynn d/b/a Lynn Broadcasting (Lynn) and Edith M. Gelfand (Gelfand), but assessed a diversification demerit against Gelfand reflecting her spouse's broadcast interests. *Id.*, ¶ ¶ 35, 39-40.

2. The Board heard oral argument on October 16, 1992. Upon our review of the exceptions and the *Initial Decision* in light of the evidentiary record, we uphold the ALJ's conclusions and agree that Jamal is financially qualified and that its application is preferred under the standard comparative issue.

FINANCIAL QUALIFICATIONS

3. By *Memorandum Opinion and Order*, 91M-3255, released November 12, 1991, the ALJ added the following hearing issues against Jamal:

> (a) To determine whether Jamal Broadcasting, L.P. is financially qualified.
>
> (b) To determine whether Jamal Broadcasting, L.P. falsely certified that it was financially qualified.
>
> (c) To determine in light of the evidence on (a) and (b) whether Jamal Broadcasting, L.P. is qualified.

Initial Decision at ¶ 1.

4. The following facts were established at the hearing. In September of 1989, Jamal sole general partner Michael Grant entered into negotiations with CVC Capital Corporation (CVC) and its president, Joerg G. Klebe, seeking CVC's participation in an application for the Mt. Juliet authorization as both a 75% equity limited partner and as the proposal's primary financier. Jamal Exhs. 26-27; Tr. 686. CVC is a venture capital firm and a Minority Enterprise Small Business Investment Company (MESBIC) operating under license from the Small Business Administration (SBA) and specializing in lending to minority broadcast applicants. Jamal Exh. 27 at 1; Tr. 631-36. Klebe reviewed Grant's "highly detailed" financial plan, personal financial statement and resume, and discussed with Grant his background and plans for the station. Jamal Exh. 27 at 2-3; *Initial Decision*, ¶ 3. Klebe also consulted CVC's internal information resources and reviewed drafts of a proposed partnership agreement before deciding to join Grant in forming Jamal Broadcasting, L.P. Jamal Exh. 27 at 2; Tr. 667-68. On October 6, 1989, CVC furnished a letter to Grant also assenting to fund the construction and initial operations (but not the prosecution) of the Mt. Juliet proposal up to $500,000. *Initial Decision*, ¶ 3; Jamal Exh. 17.

5. On October 7, 1989, Grant unilaterally elected not to pursue the partnership with CVC but to file the application in his own name as a sole proprietor. Jamal Exh. 26 at 5.[3] Grant testified that he or his attorney contacted CVC to ascertain its willingness to continue to serve as the applicant's financier. *Id.*; Tr. 734. Klebe responded that he wanted a revised financial plan. Jamal Exh. 26 at 5. Although Klebe does not recall whether he received the revised plan, one was prepared reflecting minor changes regarding the payment of expenses associated with the pros-

[1] A former party to this proceeding, Q Prime, Inc., was dismissed with prejudice by *Order*, 7 FCC Rcd 5578 (Rev. Bd. 1992), for failure to file exceptions to the *Initial Decision*.

[2] The parties do not question the applicability of the 1965 *Policy Statement* to this proceeding.

[3] Grant testified that he abandoned the partnership proposal because he was unwilling to accept a provision of the partnership agreement requiring him to take out a $100,000 "key man" life insurance policy for the benefit of CVC. Jamal Exh. 26 at 5; Tr. 641-42, 732.,

ecution of the application. *Id.*; Jamal Exh. 18. Jamal maintains that Klebe orally informed Grant or counsel "[o]n or about October 10, 1989," that CVC was willing to fund Grant's proposal and that Klebe would write Grant a second "reasonable assurance letter on the same substantive terms as CVC's October 6, 1989 letter." Jamal Exh. 26 at 6. Grant was then informed that the only change in the second letter's terms, besides the substitution of Grant for Jamal Broadcasting, L.P. as recipient, would be the additional requirement of payment of a $750 commitment fee. *Initial Decision*, ¶ 5; Tr. 762. On the following day, October 11th, CVC mailed Grant the letter which, as promised, contained terms identical to those of the October 6th letter (except for the $750 fee). Jamal Exh. 21. Grant received the second CVC letter during the "normal course of business." Jamal Exh. 26 at 7.

6. Under the original proposal as envisioned by Grant, the limited partner, CVC, was to be responsible for payment of the application's prosecution expenses, including the FCC filing and hearing fees. *Id.*, at 1, 5. The proceeds of CVC's $500,000 loan may not be used for this purpose. Tr. 654. As a sole proprietor, Grant must himself meet these expenses. *Initial Decision*, ¶ 4; Tr. 739-40. Grant proposed to finance the estimated $27,050 of prosecution expenses from his income as the expenses come due. *Initial Decision*, ¶ ¶ 5, 34.[4] The expenses would be met through monthly payment arrangements concluded with counsel and the engineer prior to certification. Grant reduced these oral agreements to writing on October 11, 1989, the date of his certification. *Id.*; Jamal Exh. 19. Counsel orally agreed to advance Grant's FCC fees shortly after certification. Tr. 709-14.

7. On October 11, 1989, Grant completed his FCC application. In response to Question 1, Section III of the application form, Grant certified that he was financially qualified -- "that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." He reported cost estimates of $421,040 for the proposed facility's construction and initial operations. As the source of these funds he listed CVC (a $500,000 loan for construction and initial operations only) and himself (a $27,050 pledge for prosecution expenses only). FCC 301, Section III, Question 3. When he certified, Grant had not yet seen CVC's second assurance letter confirming its willingness to fund the sole proprietorship. Jamal Exh. 26 at 7. Grant's application was filed on October 12, 1989.

8. After the application's filing, Grant entered into a limited partnership agreement with United Communications, Inc. (UCI) to form Jamal Broadcasting, L.P. in which Grant is the general partner with a 25% equity interest and UCI is the limited partner holding the remaining 75% equity. *Initial Decision*, ¶ ¶ 6-11. Grant notified CVC of the partnership's formation and forwarded to it the financial statements of the UCI principals. Jamal Exh. 27 at 12. CVC sent Grant a letter on January 19, 1990, reconfirming its willingness to fund the proposal as again restructured. Jamal Exh. 22. On January 26, 1990, Grant submitted an amendment to his application replacing the sole proprietorship with Jamal Broadcasting, L.P. as the applicant and confirming his earlier financial certification. *Initial Decision*, ¶ 6. Jamal then furnished the $750 commitment fee to CVC. Jamal Exh. 26 at 8; Tr. 743-44.

9. The *Initial Decision* concluded that although Grant did not have CVC's second letter on hand when he made the financial certification:

> There is no question that Grant acted in good faith when he certified. CVC had already sent him a letter of assurance when it looked like the applicant would be a partnership with Grant as general partner. CVC had told Grant two days before he filed that it would also make the loan if he applied as an individual. The second letter differs in no material respect from the first. Under these circumstances it cannot be concluded that Jamal did not truthfully certify.

Initial Decision at ¶ 33. The ALJ found further that Grant made sufficient arrangement for the payment of prosecution expenses and that, in view of the participation of his new limited partner which has pledged $80,000 of additional funding, no question remained as to Jamal's financial abilities. *Id.*, ¶ 34.

10. Lynn urges in its exceptions to the *Initial Decision* that Grant did not have on hand the required documentation of the availability of financing when he certified but had only Klebe's word that the second letter would be forthcoming (Lynn Exceptions at 3-4); Grant had neither sufficient assets nor the required documentation to meet the projected prosecution expenses (*id.*, at 5-8); the October 11th letter fails to provide reasonable assurance (*id.*, at 8-13); and that Grant falsely certified his financial qualifications (*id.*, at 13-14). Jamal counters that Grant's possession of the "essentially identical" October 6th CVC letter coupled with Klebe's oral confirmation of its continuing validity provided a sufficient basis upon which to certify financial qualifications (*Jamal Reply Exceptions* at 2); Jamal sufficiently demonstrated its ability to meet projected prosecution expenses on an ongoing basis (*id.*, at 2-4); and that the CVC letters provide reasonable assurance of funding under applicable Commission precedent (*id.*, at 5-9).

11. Although, as amplified below, we find no cause to question the *Initial Decision*'s ultimate holding that Grant certified to his financial qualifications "truthfully" and in "good faith," *Initial Decision* at ¶ 33, we wish to expand somewhat upon the ALJ's treatment of the specified issues. In determining whether Jamal's predecessor was financially qualified at the time of certification, we point out that:

> Reasonable assurance is an objective standard. An applicant's subjective belief that it has a lender's assurance, or should have assurance, is not sufficient to meet the standard, although it may reflect on the applicant's intent when certifying to her qualifications. *See generally Janice Fay Surber*, 5 FCC Rcd at 6159 ¶ 27.

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[4] Since filing his application, Grant has combined with United Communications, Inc. (UCI) to form Jamal Broadcasting, L.P., and he has amended his application to substitute Jamal as the applicant. UCI is committed to providing Jamal $80,000 which can be used to fund prosecution. *Initial Decision*, ¶ 34; *see infra* ¶ ¶ 8, 22.

Isis Broadcast Group, 7 FCC Rcd 5125, 5130 n.17. (Rev. Bd. 1992). Our analysis of Jamal's financial qualifications at certification begins with a brief review of the Commission's procedures for establishing applicants' financial qualifications to be licensees.

12. Prior to 1981, the Commission required broadcast applicants to submit documentation with their applications demonstrating their financial qualifications: that is, that sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenue. In 1981, as part of an effort to expedite the processing of applications and to reduce the burden on applicants and staff, the Commission adopted a certification procedure asking applicants to check a box to indicate whether they were financially qualified under the Commission's continuing financial qualification standard. *Revision of Form 301*, 50 RR 2d 381, 382 (1981). Documentation supporting the certification was not to be submitted with the application. *Id.*, at 388.

13. Eight years later, in an effort to stem the observed widespread abuse of the certification procedure, the Commission acted to reinvigorate its financial requirements. *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3859 (1989) (*Revision Order*).[5] Although the underlying standards for financial qualifications remain unchanged, applicants filing after June 26, 1989, must report: (1) their estimate of the total funds necessary to meet construction and initial operating costs, and (2) the source(s) of such funds. In addition to these reporting requirements, the Commission also reimposed a contemporaneous documentation requirement:

> we are not returning to our pre-1981 reporting requirements, and we are not requiring the applicant to *submit* underlying documentation to verify its cost estimate or funding sources. However, as we did prior to 1981, we are now requiring that the applicant *have* such information and documentation on hand at the time it submits the application. We stress that when the applicant checks the box on Form 301 that it is financially qualified, it must have *at that time* . . . sufficient funds available from committed sources to construct and operate the facility.

Id. (emphasis original). The Mt. Juliet applicants are subject to these enhanced 1989 financial certification requirements.

14. The instructions to the revised financial qualifications section of Form 301 provide in pertinent part:

> D. (3) The applicant must also have on hand, at the time it files its application, BUT NEED NOT SUBMIT WITH THE APPLICATION, the following documentation:
>
> * * *
>
> (d) For financial institutions or equipment manufacturers, identified in response to Question 1(c), Section III, who have agreed to make a loan or extend credit:
>
> The document by which the institution or manufacturer has agreed to provide the loan or credit, showing the amount of [the] loan or credit, terms of payment or repayment of the loan, collateral or security required, rate of interest to be charged, any special requirements (e.g., moratorium on principal or interest, waiver of collateral, etc.). . . .

Id., at 3864.[6] Grant reviewed these instructions with counsel prior to certifying. Tr. 762.

15. In its exceptions, Lynn asserts that Grant was not financially qualified under the Commission's revised standards because Grant "had no written documentation of the availability of any financing from CVC on hand at the time he filed his application, but certified his financial qualifications based solely upon 'Mr. Klebe's word that the new [October 11, 1989] letter would be forthcoming.'" *Lynn Exceptions* at 3 (quoting Jamal Exh. 26 at 7). Moreover, Lynn continues, the ALJ erred in failing to implement the Commission's 1989 *Revision Order* and in concluding that "an oral commitment, coupled with CVC's 10/6/89 letter (Jamal 17) would suffice to render Grant financially qualified." *Lynn Exceptions* at 4 n.3. We do not agree that the facts presented fail to satisfy the Commission's heightened standards for financial certification nor that such standards were in any event intended to be applied in such an overarching, technical manner as Lynn suggests so as to result in Jamal's financial disqualification.

16. The facts in evidence demonstrate that, before certifying, Grant and Klebe engaged in a meaningful dialogue concerning Grant's individual qualifications and his specific plans for the Mt. Juliet proposal. Moreover, Klebe, who has established expertise in broadcast lending, satisfied himself that the project was viable and otherwise worthy of CVC financing before penning the October 6, 1989 commitment letter. The letter described the terms and conditions of the proposed loan and Grant reviewed and accepted those terms. When Grant decided not to proceed with a limited partnership with CVC, he requested that it continue to finance the proposal as previously agreed. Although Klebe may not have received a revised financial plan, Klebe was nonetheless sufficiently satisfied with the proposal to orally confirm CVC's willingness to continue the established funding arrangement for the sole proprietorship. The fact that CVC would no longer be an equity holder in the proposal did not serve to diminish CVC's interest in participating in the proposal as a lender. Klebe explained:

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[5] In 1987, the Commission instituted a random audit of applications to ascertain and promote the level of compliance with the certification procedures. *Certification of Financial Qualifications*, 62 RR 2d 638, 639 (1987). The Commission later observed in its 1989 *Revision Order* that the audit had failed to pose a sufficient deterrent to continuing certification abuses. 4 FCC Rcd at 3858-59.

[6] None of the parties question the applicability of this provision to MESBIC funding, albeit a MESBIC is not technically a financial institution. *See Salt City Communications, Inc.*, 7 FCC Rcd 4221, 4225 (Rev. Bd. 1992). *But see Washington's Christian Television Outreach, Inc. (Hearing Designation Order)*, BC 002820, released Aug. 19, 1981 (MESBICs considered to be financial institutions for purposes of Section III of Form 301).

> My October 6, 1989 commitment letter to a partnership in formation which would have included CVC as its limited partner has considerable significance here. I felt especially comfortable with the market and the applicant -- comfortable enough that CVC was willing to go beyond the role of a lender and also carry the costs attendant to prosecution and the [sic] some of the risks associated with being an equity holder. Being merely a lender was a lesser commitment, involving no immediate risk, than being an investor. Having done sufficient due diligence to permit CVC to be an investor *and* a lender, there was no reason for CVC not to agree to be merely a lender.

Jamal Exh. 27 at 11 (emphasis original).

17. Lynn has not refuted the direct evidence that Grant had knowledge prior to certification founded on the October 6th letter and October 10th oral communication that: (1) the funds would be available to the sole proprietorship and (2) the terms and conditions of the October 6th letter would continue to apply (except for the additional fee, of which Grant also had knowledge). Grant's unrebutted testimony, which is essentially corroborated by Klebe, is "substantial reliable evidence" establishing the existence of the oral confirmation of the continuing and contemporaneously documented loan agreement with CVC. *See Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990), *aff'd*, 941 F.2d 1214 (D.C. Cir. 1991); *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942, 2946 (Rev. Bd. 1992), *rev. denied*, FCC 92-523, adopted November 23, 1992. We find no basis upon which to overturn the ALJ's record-supported findings based on this unquestioned testimony. *See Richardson Broadcast Group*, 7 FCC Rcd 1583, 1588 (1992). We therefore reject Lynn's contention that Grant's certification was based merely on Klebe's oral assurance of funding.[7]

18. Moreover, we decline to find, as Lynn suggests, that the *Revision Order*'s documentation requirements were violated. We agree with the ALJ that Jamal sufficiently satisfied the contemporaneous documentation requirement by Grant's possession of the October 6th CVC letter whose continuing validity was orally confirmed before certification (and put into writing the day of certification). *Compare Sumter Radio Partners*, 7 FCC Rcd 2573, 2576 (Rev. Bd.)(no financial qualifications issue necessary where applicant had received a second, post-certification bank letter clarifying certain ambiguities present in the first letter), *rev. denied*, 7 FCC Rcd 5977 (1992) *with REM Malloy Broadcasting*, 6 FCC Rcd 5843, 5844 (Rev. Bd. 1991)(financial issue added where subsequently-obtained bank letter which purportedly "memorialized" earlier understanding bore little resemblance to first letter obtained from the bank three years before).[8]

19. Lynn further argues that, in any event, the October 11, 1989 letter did not convey reasonable assurance of the availability of funds to Jamal. Specifically, Lynn posits that the letter set forth insufficient terms with respect to required collateral, personal guarantees, Grant's creditworthiness, and other unspecified future terms of the proposed loan. *Lynn Exceptions* at 8-13. Our analysis of the validity of the CVC letters rests on the following foundation:

> [I]n order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether . . . the prospective borrower has provided the bank with [the borrower's assets, credit history, current business plan, and similar] data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and

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[7] The following colloquy at oral argument highlights the crux of the dispute: whether the October 11th CVC letter is considered as a continuation of a previously-concluded financial arrangement (the ALJ's view) or as the beginning of a new financial relationship (Lynn's theory):

> [Board Member]: . . . why is it not sufficient that [Grant] receives an oral assurance through his representative that the letter he has is essentially in effect, and that will be confirmed?
>
> [Lynn Counsel]: Well, it was not that the letter was going to be in effect, but that Mr. [Klebe] was going to send him another letter, and was going to go ahead and provide financing to him, as an individual.
>
> [Board Member]: So the meat of your argument is that, the Commission's language, documentation must be on hand, means, it must be in the hand of the applicant, . . . not simply created and assured [by] the applicant's representative.
>
> [Lynn Counsel]: . . . yes. I think there is a distinction because, if he had had that letter, and a verbal assurance that he was going to get another letter, I think there is a distinction between that and the question of, well, a new letter has been prepared, and he just has not received it.
>
> I mean, there is a distinction. . . . I cannot see that there would be any way that the Commission could find somebody financially qualified, under the current standard, based on an oral representation . . . and an old letter.

Tr. 782-83. The difference is not merely semantical. Lynn's counsel appears to concede that if the facts are as the ALJ views them, an oral confirmation of a continuing (and documented) financial arrangement, such arrangement would comply with the Commission's *Revision Order*. Because that *is* how we interpret the facts, we also conclude that Grant had sufficient documentation to support his certification.

[8] Although Lynn makes a plausible argument that the revised 301 Form's requirement of contemporaneous balance sheets for non-institutional sources of funds or credit upon which the applicant relies to meet its cost estimates, *see* 4 FCC Rcd at 3864, *applies also to the applicant's arrangements for payment of prosecution expenses*, we decline to so extend the *Revision Order's* documentation requirements in view of Jamal's payment of its prosecution expenses on an ongoing basis and absent some more direct Commission guidance on this point. *See infra* ¶ 22.

> accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters, Limited Partnership, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893, *recon. dismissed*, 6 FCC Rcd 4626 (1991). *See Liberty Productions, A Limited Partnership*, FCC 92-506, released November 23, 1992; *see also Salt City Communications, Inc.*, 7 FCC Rcd 4221, 4225 (Rev. Bd. 1992) (*Scioto* standards applied to MESBIC funding arrangements); *Welch Communications, Inc.*, 7 FCC Rcd 4542, 4544 (Rev. Bd. 1992) (same).

20. We agree with the *Initial Decision* that the preliminary arrangements concluded between Grant and CVC were sufficient under the *Scioto* standard.[9] As already discussed, the lender had the required familiarity with the borrower and its proposal and the borrower had the necessary familiarity with (and acceptance of) the lender's terms. Jamal Exh. 27 at 4-8. Grant provided a written personal guarantee to CVC on October 6, 1989. Jamal Exh. 20. Although the letter is subject to future collateral agreements, it also provides that:

> the loan would be secured by all the accounts receivable, inventory, equipment, and other assets of the Mt. Juliet, Tennessee station, in accordance with the FCC's rules and policies, and would be secured by such real and personal property deemed appropriate by CVC.

Jamal Exhs. 17, 21. Moreover, in light of the presence of the other basic terms in the letter, we view the preliminary agreement reached on collateral sufficient to establish reasonable assurance. *See Harrison County Broadcasting Co.*, 6 FCC Rcd 5819, 5821-22 (Rev. Bd. 1991) (reasonable assurance found despite vague collateral and personal guarantee requirements where letter relied on station's physical assets and corporate shares); *A.P. Walter, Jr.*, 6 FCC Rcd 875, 877-78 (Rev. Bd. 1991)(reasonable assurance found despite bank letter's lack of collateral term where borrower had substantial past relationship with bank); *accord Salt City Communications*, 7 FCC Rcd at 4226, and cases cited therein.[10]

21. We also disagree that the credit check condition and the "any other conditions that are reasonably designed to secure CVC's loan" language serve to undercut the letters' effectiveness. The existence of such terms in a commitment letter is not fatal if key provisions are provided and the overall circumstances demonstrate that reasonable assurance is present. *A.P. Walter, Jr.*, 6 FCC Rcd at 877-78 (reasonable assurance found where bank loan "contingent on the exact credit conditions prevailing at the time of such commitment"). Lynn cites no authority that a credit check is essential to reasonable assurance where the lender is otherwise familiar with the borrower's financial data. Klebe explained that it is customary for financial institutions to defer performance of credit checks until such time as the formal loan application is submitted. Jamal Exh. 27 at 6. *Accord Colonial Communications, Inc.*, 5 FCC Rcd 1967, 1968 ("bank commitment letters are traditionally and understandably conditional upon review of the applicant's financial health at the time the monies are actually advanced"), *recon. denied*, 5 FCC Rcd 3797 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2296 (1991); *recon. dismissed*, 7 FCC Rcd 674 (1992). With respect to the final open-ended condition, Klebe stated that "this boilerplate, catch-all provision was required by the changing nature of SBA regulation." Jamal Exh. 27 at 7.[11] Accordingly, based on the totality of the circumstances presented, we conclude that the CVC letters conveyed reasonable assurance of funding to Jamal.

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[9] The October 6th and 11th letters set forth the following identical conditions for the loan:

> 1. receipt by CVC of a representation by you and verification thereof, that you are now, and at the time that CVC loans funds to you, a small business concern which is controlled and managed by socially and economically disadvantaged individuals;
>
> 2. your obtaining a construction permit for Channel 294A at Mt. Juliet, Tennessee from the Federal Communications Commission ("FCC");
>
> 3. your executing and delivering a loan agreement, promissory note, and other loan and collateral documents and personal guarantees which shall be in form and substance satisfactory to CVC;
>
> 4. your meeting CVC's credit criteria at that time of the loan;
>
> 6 [sic]. your providing adequate collateral to secure CVC's loan to you; and
>
> 7. your meeting any other conditions that are reasonably designed to secure CVC's loan.

Jamal Exhs. 17, 21. The letters also contain the ordinary fundamental loan terms including the identity of the borrower, the amount of the loan, how the loan proceeds may be used, interest rate, payment period, and the general conditions for approval *per Scioto Broadcasters*, 5 FCC Rcd at 5160.

[10] Klebe explained at hearing that the borrower's personal financial wherewithal was of little import in the MESBIC's funding decisions; the major consideration in determining whether to extend a loan was the borrower's business plan and the lender's analysis of the market. Jamal Exh. 27 at 4-6. The Commission generally refrains from second-guessing the informed judgments of financial institutions and we perceive no reason for treating CVC otherwise. *See Liberty Productions*, FCC 92-506, at ¶ 22.

[11] The only authority cited by Lynn to support its argument that the letters' final provision defeats its ability to convey reasonable assurance is *Albert E. Gary*, 5 FCC Rcd 6235 (Rev. Bd. 1990). We do not agree. In that proceeding, the Board added a financial issue where the underlying bank letter was missing "several basic terms." *Id.*, at 6237.

22. Finally, we reject Lynn's assertions that Jamal is not financially qualified due to its perceived inability (and lack of adequate documentation) to meet its prosecution expenses. *Lynn Exceptions* at 5-8. Although the costs of prosecution are part of the expenses associated with station construction and are to be included in an applicant's determination of its financial qualifications, *see Coast TV*, 5 FCC Rcd 6720, 6722 (Rev. Bd. 1990), the Commission has long held that where an applicant pays the prosecution expenses on an ongoing basis, such costs are not to be considered as detracting from the applicant's financial qualifications. *Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562, 4563 (1990); *Muncie Broadcasting Corp.*, 54 RR 2d 42, 46-47 (1983); *Weyburn Broadcasting Limited Partnership*, 6 FCC Rcd 1262, 1265 (Rev. Bd. 1991) (subsequent history omitted); *Northampton Media Associates*, 3 FCC Rcd 5164, 5167 (Rev. Bd. 1988)(subsequent history omitted). The ALJ found that Jamal is paying prosecution expenses on an ongoing basis and we will thus consider this matter no further. *Initial Decision*, ¶ 34.[12]

COMPARATIVE EVALUATION

23. The *Initial Decision* credited Jamal with 100% integration for its proposal to integrate general partner Michael Grant into the full-time management of its proposed station as general manager. The ALJ found that Grant will resign from his current employment at Conceptions, Inc., a communications consulting firm in Nashville, Tennessee, of which he is the founder, 50% owner, Chairman, and CEO.[13] Grant will retain his ownership interest and his position as Chairman and will continue to spend about five hours per month on Conceptions business reading reports and attending board meetings. The balance of Grant's responsibilities will be borne by his 50% partner in the business, Jackie Thompson, and another employee, Tracy Carr.[14] *Initial Decision*, ¶ 22. Jamal also represents that Grant will reduce his participation in civic activities to no more than 20 hours per week. *Id.* Grant is President of the local NAACP and devotes 15 hours per week to his duties in that position. *Id.*, at ¶ 27.

24. Lynn excepts to the crediting of Jamal's proposal on the grounds that: (1) UCI is materially involved in the application; (2) the "locus of control" of Jamal is uncertain; and (3) Jamal has failed to carry its burden of demonstrating the likelihood that Grant will effectuate his integration proposal. *Lynn Exceptions* at 14. Gelfand asserts that Grant's integration plan is not credible in view of his ongoing business and professional pursuits. *Gelfand Exceptions* at 16.

25. Lynn urges that *Coast TV*, 5 FCC Rcd 2751 (1990), compels the reduction of credit accorded to Jamal due to the material and post-formation activities of its limited partner. *Lynn Exceptions* at 18-22. Lynn states that Grant communicated with UCI President Lawrence Doss on a dozen occasions regarding "major milestones" in the proceeding despite provisions in the underlying partnership agreement barring communications with the limited partner regarding the day-to-day business of the partnership. *Id.*, at 19. Further, Lynn avers that evidence surrounding Jamal's organization and operations, including Grant's disproportionate capital contribution, the "pervasive" involvement of counsel, the alleged "interrelationship" among counsel, CVC and UCI, and Grant's explanation for adding UCI to his proposal, suggests "undisclosed intentions" and presents uncertainty that Grant will exercise exclusive control over the application. *Id.*, at 20-21. We will deny these exceptions.

26. The *Initial Decision* found that Grant consulted Doss about settlement efforts on one occasion; that Grant contacted Doss several times about financing; and that Grant volunteered to update UCI on the status of the proceeding every three or four months. *Initial Decision*, ¶ 23. However, in view of Grant's single-handed role in the application's preparation and the extensive and arms-length negotiations concluded between Grant and UCI before forming Jamal, the ALJ concluded that the record did not support a finding that Jamal's structure is not genuine. *Id.*, at ¶ 41. Lynn has failed to show sufficient basis to depart from the ALJ's conclusions or that the contacts indicate an impermissible level of involvement by the passive owners in the application or otherwise serve to undermine Grant's exclusive managerial control over the applicant. *See Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1434 (integration proposal not undermined by limited contact and status reports to limited partners), *recon. denied*, 7 FCC Rcd 6594 (Rev. Bd. 1992); *Isis Broadcast Group*, 7 FCC Rcd at 5136 (same).[15] Moreover, we find Lynn's "locus of control" exceptions to be a mere accumulation of unfounded speculation providing insufficient justification for discrediting Jamal's proposal. *See Cleveland Television Corporation v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984)("mere suspicion" no basis to disregard applicant's ownership structure); *Frank Digesu, Sr.*, 7 FCC Rcd 837, 837 (Rev. Bd. 1992) (integration credit will be denied to artificially-structured proposals where premised on *compelling and specific record evidence* establishing that the subject proposal is inherently unreliable).

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[12] Because we have found that Grant properly certified to his underlying financial qualifications, we do not consider Lynn's exceptions that Jamal should also be disqualified for making a false financial certification.

[13] Jamal reported in an August 3, 1992 amendment to its application that Conceptions, Inc. was closed on July 31, 1992, and that Grant is now doing business as Grant's Marketing Consultants, a sole proprietorship. Grant will close this business upon finality of the grant of Jamal's application. *Cf. Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794 (Rev. Bd. 1984)(a post cut-off media acquisition accompanied by a contemporaneous pledge to divest will not be counted against the applicant)(subsequent history omitted), cited in *Emision de Radio Balmeseda, Inc.*, 7 FCC Rcd 3852, 3855 (Rev. Bd. 1992). This information comes too late to affect the comparative posture of Jamal's proposal. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434 (1981)(applicants may not amend to improve their comparative positions after the period for filing amendments as a matter of right has expired).

[14] Carr was working for Conceptions on a full-time basis when Jamal exchanged its direct written case. Jamal Exh. 3 at 1. By the time of the Phase I Hearing in this proceeding, he was working on a part-time basis until the end of the school year. Carr is a senior at Vanderbilt University. Tr. 203.

[15] In *Coast TV*, 5 FCC Rcd 2751, 2752 (1990), the Commission affirmed the attribution of an applicant's passive interests where its limited partners had continued to participate in the application's preparation and management after the application was filed by "participating in [meetings] concerning prosecution of [the] application; seconding motions; completing the application; paying bills, obtaining reasonable assurance of site availability; and developing EEO plans." 4 FCC Rcd 1786, 1787 (1989).

27. In arguing that Grant is unlikely to effectuate his integration proposal, Lynn posits that Jamal has "advanced no showing demonstrating how Grant would accommodate his existing business and professional activities" with his full-time integration pledge and that it has "merely proposed that Grant would *diminish* the time which he currently devotes to Conceptions, Inc. by turning over most of his current duties . . . to a current employee, who already works fulltime in the business, while hiring no new employees." *Lynn Exceptions* at 16-17 (emphasis original). Similarly, Gelfand contends that Jamal has "merely proposed that Mr. Grant will 'reduce' his current business activities" and that "Grant's proposal to accommodate his existing business and professional interests is too vague to have any evidentiary value and contradicts his assertion that he would maintain a fulltime, 40 hour per week work schedule at the station." *Gelfand Exceptions* at 18-19. Gelfand asserts further that Grant's plan to turn over his business, which represents his principal source of income, to a part-time college student is "unbelievable." *Id.*, at 16. Moreover, Gelfand argues, the ALJ employed the wrong standard in holding that it was Gelfand's burden to show that Grant's integration proposal was "impossible." *Id.*, at 17 quoting *Initial Decision*, at ¶ 43.

28. Jamal rejects the exceptors' characterizations of its accommodation showing and states that it has proffered a "very specific proposal":

> Jamal detailed (1) exactly what Mr. Grant would continue to do (attend board meetings and review reports); (2) how much time it would take (approximately five hours per month) and (3) specifically who has agreed to take over for him (Jackie Thompson and Tracy Carr). Jamal Ex. 3 at 1

Jamal Reply Exceptions at 16. Jamal further notes that the exceptors have failed to develop evidence that Thompson and Carr are incapable of handling Grant's duties or that Grant will not otherwise be able to fulfill his commitment. *Id.*, at n.9. Jamal also reiterates that Carr will take over Grant's position as Conceptions' CEO. *Id.* Carr has worked at Conceptions for more than two years, sometimes on a part-time basis, while he completes his education at Vanderbilt University. Grant testified that he has trained Carr on the company's business and that Carr works well with Thompson. Tr. 203-04.

29. The parties have correctly enunciated the standard for crediting the integration proposals of those who propose also to retain ongoing business or employment relationships. As the Commission has most recently pronounced:

> Our current policy, as delineated in *Blancett* and in more recent opinions, holds that in order to sustain a claim of credit for the full-time integration of someone planning to retain outside businesses, an applicant must set forth a specific and credible plan explaining how the principal in question would arrange for the businesses to be managed while fulfilling his integration commitment. 17 FCC 2d at 230 ¶ 7. *See also Naguabo Broadcasting Company*, 6 FCC Rcd 4879, 4880 ¶ 8 (1991).

Kevin Potter, 7 FCC Rcd 4342, 4342 (1992); *accord Kennelwood Broadcasting Company, Inc.*, 7 FCC Rcd 4580, 4580 (1992)(crediting integration of principals proposing to retain their retail store but to curtail their activities in connection therewith where no evidence that they will participate in store's day-to-day management or that they have critical or essential skills which cannot be easily replaced).

30. We approve the *Initial Decision's* ruling that Jamal has satisfied the Commission's requirements by presenting a plan that is both specific and credible and explains how Grant will accommodate his business and other activities with his full-time integration proposal. Grant did not merely propose to generally reduce his involvement with his business; he described the duties he will continue to perform and the time such duties will involve and he identified two experienced employees (one a part owner) who will take up his former duties. Jamal has thus met its affirmative burden of adducing specific and credible evidence of how Grant will accommodate his continuing commitments with his integration proposal.[16] The exceptors have failed to undermine that showing. *See Fresno FM Limited Partnership*, 7 FCC Rcd 4339, 4339 (1992)(integrated principal's plan to retain his advertising agency and to reduce his activities to five hours per week was specific and credible where the balance of his agency duties were to be borne by three experienced and continuing employees); *Coastal Broadcasting Partners*, 7 FCC Rcd at 1433 (integrated principal's retention of four McDonald's franchises and continuing involvement of "only a few hours each month" where daughter and husband would assume most of her responsibilities was specific and credible evidence of principal's ability to effectuate integration).[17] We thus affirm Jamal's receipt of 100% quantitative integration credit.

31. While the *Initial Decision* also awarded 100% quantitative integration credit to Lynn and Gelfand, the ALJ determined that the two proposals were qualitatively inferior to Jamal's. Grant's minority status, combined with his long-term residence and civic involvement, prevails

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[16] In contradistinction to Jamal's specific and credible plan for accommodating Grant's continuing business and professional activities with his full-time integration commitment, Gelfand's integrated principal, Edith Gelfand, plans only to "curtail" her other business activities and to make her music company's Nashville apartment her "primary residence" (while retaining her Palm Beach, Florida and Washington, D.C. residences) should she receive the construction permit. *Initial Decision*, at ¶ ¶ 19-20. Gelfand has not decided which will be her "home residence." *Id.*, at ¶ 20. While Gelfand has pledged to work "full time" at the proposed station, she does not plan to be physically present in Nashville or at the station on a full-time basis. *Id.*, at ¶ 18; Tr. 857-63 (note that transcript erroneously attributes cited discussion to Lynn's counsel instead of Gelfand's attorney). Because Gelfand's proposal is qualitatively inferior to Jamal's, we make no decision as to its reliability. *See infra* ¶ 31.

[17] Lynn and Gelfand also contend that Grant's continuing "professional activities," which he proposes to limit to 20 hours per week, are further cause to question the reliability of his full-time integration proposal. *Lynn Exceptions* at 18; Tr. 846-49, 857-63. Among these "professional activities" are Grant's position as the President of the local NAACP. While broadcasters' continuing participation in local civic activities is generally encouraged under Commission policies, *see, e.g., Policy Statement*, 1 FCC 2d at 395-97, too much time *committed* to be spent in such activities can raise doubts that a principal will

over the qualitative enhancement credit Lynn receives for its principals' residence and civic involvement which is unaccompanied by minority credit.[18] Both Jamal and Lynn are superior to Gelfand, who has no minority or past residence qualities. *Initial Decision*, ¶¶ 44-45.[19] We affirm the ALJ's comparative evaluation of the applicants and therefore do not reach the parties' remaining and non-decisional exceptions. *See Colonial Communications, Inc.*, 6 FCC Rcd at 2296.

32. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed by Jamal Broadcasting, L.P. on August 3, 1992 IS GRANTED, that the amendment IS ACCEPTED for reporting purposes only, and that the Reply to Partial Opposition to Petition for Leave to Amend filed by Jamal Broadcasting, L.P. on August 17, 1992, IS STRICKEN.

33. IT IS FURTHER ORDERED, That the applications of Grady Lynn and Carol Lynn d/b/a Lynn Broadcasting (File No. BPH-891011MJ) and Edith M. Gelfand (File No. BPH-891012MN) ARE DENIED; and that the application of Jamal Broadcasting, L.P. (File No. BPH-891012MS) for a construction permit for a new FM station on Channel 294A at Mt. Juliet, Tennessee, IS GRANTED provided:

> Before PROGRAM TEST AUTHORITY is authorized by the Commission a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio-frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of compliance with this special operating condition along with the form 302, application for license, and the request for PROGRAM TEST AUTHORITY.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

My principal difficulty with this *Decision* is bracketed within paras. 27-30, *ante*, and relates to Jamal's proposal to retain his current business while integrating "full-time" into this station. Both opponents assert that the pledge of Jamal's principal, Michael Grant, to turn over a business that represents Grant's primary source of income to a part-time college student is vague and unworthy of credit. In *Gloria Bell Byrd*, FCC 92R-88, adopted November 24, 1992, at paras. 18-21, this same Board panel unanimously applied the principle of *Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969), that the retention of another significant business interest raises a strong doubt that "full-time" will be devoted to the station, and mere promises by a proponent to diminish time spent on an outside interest are inadequate to overcome the doubt. *See also Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991).

At bar, Jamal's opponents complain that the ALJ placed the burden on *them* to demonstrate that Grant's proposal was "impossible" (*see ante* para. 27), while the precedent places the burden squarely on the integration proponent. *See, e.g., Woods Communications Group, Inc.*, 7 FCC Rcd 78, 80-81 (1992)(citing *Cuban-American, Ltd.*, 5 FCC Rcd 3781, 3875 (1990)), *recon. denied*, 7 FCC Rcd 4604 (1992). *But cf. Helen Broadcasters, Inc.*, 7 FCC Rcd 6844 (1992) ("self-serving ... testimony ... not inherently implausible" that applicant will devote only 1 hr. per week to his 5,500 acre nature preserve).

My colleagues, citing several recent cases (*see ante* paras. 29-30), believe they can discern a meaningful difference between Jamal's pledge and those discredited, for example, in *Naguabo* and *Gloria Bell Byrd*. As I have admitted often before, *see Kevin Potter*, 6 FCC Rcd 7278, 7281 (Rev. Bd. 1991)(concurring *dubitante*), "[r]econciling cases where credit has been ceded with cases where the same credit has been denied, and permitting ourselves the courtesy of a charitable critique, requires the audacious hand and eagle eye of the Hasidic lapidary."

If the instant applicants, or any disinterested followers of these waning comparative embroglios, can perceive a fault line where I cannot, then golden eagle feathers to them. I'm still at the level of "horsefeathers." Disclaiming the powers of a haruspex on the imponderable question of Michael Grant's future allocation of business hours, I will let my majority colleagues take the laurels for this judgment, as their view prevails in any event.

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effectuate its full-time integration proposal. *See Julia S. Zozaya*, 5 FCC Rcd 6607, 6607 (1990), *recon. denied*, 6 FCC Rcd 4416 (1991), *remanded on other grounds sub nam., Flagstaff Broadcasting Union v. FCC*, No. 90-1587 (D.C. Cir. Dec. 4, 1992); *Helen Broadcasters, Inc.*, 7 FCC Rcd 2501, 2502 (Rev. Bd.), *rev. denied*, 7 FCC Rcd 6844 (1992). Grant's proposal to work full-time at Jamal's station while devoting 20 hours per week to continuing participation in community civic activities and spending five hours *per month* overseeing his business, does not, *per se*, exceed the outer limits of credibility, *see Julia S. Zozaya*, 5 FCC Rcd at 6607, and the exceptors here have not shown that Grant's proposal is not credible under the circumstances presented.

[18] The exceptions of Lynn contending that its residence and civic activities are superior to those attributes of Jamal are non-decisional. Both applicants receive substantial credit under the unified residence and civic involvement criterion. Even if Lynn were to receive a slightly stronger credit thereunder, such advantage could not outweigh the substantial credit Jamal receives for Grant's minority status. *See Lorraine Walker Arms*, 6 FCC Rcd 5586, 5587 (Rev. Bd. 1991).

[19] Gelfand's claims to local residence credit based on her infrequent visits to her company-owned apartment in Nashville and her pledge to make the apartment her "primary" residence in the future could not, even if credited, overcome Jamal's superior attributes for minority status and local and civic involvement.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-25

In re Applications of

STANDARD BROADCASTING, INC. File No. BPH-870624MI

LEXINGTON COMMUNICATIONS, LTD. File No. BPH-870629MV

For Construction Permit for
New FM Station on Channel 253A,
Lexington, South Carolina

Appearances

Lawrence J. Bernard, Jr., on behalf of Standard Broadcasting, Inc.; *James J. Freeman* and *W. Kip Wood* on behalf of Lexington Communications, Ltd.

DECISION

Adopted: December 2, 1992; Released: December 15, 1992

By the Review Board: BLUMENTHAL and GREENE; Board Member ESBENSEN absent.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Joseph Chachkin, 6 FCC Rcd 7220 (1991), which granted the application of Lexington Communications, Ltd., for a new FM station in Lexington, South Carolina, and denied the competing application of Standard Broadcasting, Inc. Standard has excepted to the *Initial Decision;* Lexington has supported it. The Board heard oral argument on June 26, 1992.[1]

2. The case was designated for hearing on the standard comparative issue, pursuant to guidelines primarily set forth in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). By *Memorandum Opinion and Order*, FCC 90M-2399 (released August 6, 1990), the Presiding Officer added the following issues against Standard:

> 1. To determine whether Standard Broadcasting, Inc. has prepared, filed and made available for public inspection materials required by Sections 73.3526 and 73.3615 of the Commission's Rules;
>
> 2. To determine whether Standard Broadcasting, Inc. made misrepresentations in its 1988 renewal application; and
>
> 3. To determine whether Standard Broadcasting, Inc. made misrepresentations in its June 4, 1990 and July 20, 1990 Oppositions to motions to enlarge issues filed by Lexington Communications, Ltd.
>
> 4. To determine, in light of the foregoing, whether Standard Broadcasting, Inc. possesses the basic qualifications to be a licensee.

By *Memorandum Opinion and Order*, FCC 90M-3116 (released October 3, 1990), the Presiding Officer added the following issue against Standard:

> To determine whether Standard was lacking in candor and/or misrepresented facts respecting its ownership status and integration proposal; and if so, the effect of such conduct upon its basic qualifications to be a Commission licensee.

After hearing evidence, the ALJ found that Standard was neither reliable nor truthful and, therefore, was unqualified for the permit. He awarded the permit to Lexington.

BACKGROUND

3. Standard is the licensee of daytime-only AM station WLGO-AM in Lexington as well as an applicant for the Lexington FM channel. When it applied for the FM channel, William C. Branham, its President/Treasurer and a director, owned seventy percent of its voting stock. Arthur M. James, its Vice President/Secretary and a director, owned the remaining thirty percent, as reflected in Standard's April 16, 1987, ownership report to the Commission. *See* 7 FCC Rcd at 7222 para. 25. About two months after Standard's FM application was filed in 1987, James assigned his stock to Branham, but retained his positions as an officer and director and was orally assured by Branham that he could reacquire his ownership interest at any time by paying his share of WLGO's expenses. Tr. 48. This ownership change was not disclosed to the Commission until Standard filed its Integration Statement on March 12, 1990, and Standard did not amend its application to report the change until May 11, 1990. 7 FCC Rcd at 7222 para. 26, 7225 para. 50. Standard first advised the Commission of James' option to reacquire his stock in its 1989 ownership report, filed November 9, 1990, long after it was due.[2] In the meantime, on June 29, 1988, Branham reported that he had examined Standard's most recent ownership report and certified that the information therein was unchanged and true. *Id.* at 7222 para. 24. A week or so after this was filed, on July 7, 1988, James signed and Standard filed the renewal application for WLGO. That application contained a certification that Standard's ownership report had been filed and that the documents required by section 73.3526 had been placed in the public file at the appropriate times. *Id.* at para. 27.

[1] Board Member Blumenthal did not participate in the oral argument. He has read the transcript and, pursuant to 47 CFR 1.277(f), is participating here.

[2] Standard's ownership report for 1990 was also filed on November 9, 1990, and overdue.

4. Under section 73.3526, Standard's WLGO public file should have contained timely filed ownership reports, quarterly lists of programs that have provided the station's most significant treatment of community issues during the past quarter, and a copy of *The Public and Broadcasting - A Procedure Manual* published by the Commission. Lexington's representative, Johnnette Murray, checked the file on May 3, 1990, and reported that it contained no ownership reports or certifications after 1987 and no copy of the *Procedure Manual*. *Id.* at 7221 paras. 16-17. She also reported that program lists for the third and fourth quarters of 1985, the third and fourth quarters of 1987, and all of 1988, 1989, and 1990 were missing from the file.[3] *Id.* at para. 17. Murray checked the station file again on June 18, 1990, and reported that all of the program lists missing earlier were in the file, but the 1988 and 1989 ownership reports and the *Procedure Manual* were still missing. *Id.* at 7223 para. 34. Murray returned to WLGO a third time, on June 21, 1990, to study the physical appearance of the lists. She observed that the originally missing lists were completed with several different inks and on different types of paper, but two appeared to contain imprints of words from other lists. *Id.* at para. 36.

5. Why the lists were missing and when they were created became important questions in the hearing, and James' veracity in explaining why the lists were not in the file when Murray first checked it was at issue. After Murray's first visit to WLGO, Lexington asked the ALJ to add hearing issues relating to public file and ownership rule violations and misrepresentations regarding those matters in WLGO's 1988 renewal application. *Id.* at 7222 para. 31. In a Declaration dated June 13, 1990, James admitted that the 1988, 1989, and 1990 program lists were missing. He said that he had removed them from the file and taken them to his office to check their accuracy against the program logs. *Id.* at 7222-23 para. 32. He said he thought Murray was a student reviewing the file for a class assignment, so he did not offer to provide the missing lists. *Id.* at 7223 para. 33. After Murray's third visit to WLGO when she discovered the imprints, Lexington alleged that Standard's opposition to its earlier motion and James' Declaration contained misrepresentations about the lists originally missing from the public file and asked for a further misrepresentation issue. In opposing that, Standard filed a second Declaration from James, dated July 20, 1990, in which he explained that he had copied over the two lists from which Murray had found imprints, those being the lists for the fourth quarter of 1988 (1988-4) and the third quarter of 1989 (1989-3), after finding some errors and illegible handwriting. *Id.* at paras. 38-39. In written hearing testimony, James was somewhat less sure of which lists he had removed, and on cross examination he said he removed lists "somewhere from 1987 onward." *Id.* at 7224 para. 40. He also testified that there were no errors in the lists, he had copied them only for neatness, he had copied the list from the fourth quarter of 1987 (1987-4) as well, and he had thrown away the originals. *Id.* at paras. 41, 44, 45. There is no corroboration of his testimony on these points for James apparently told no one what he was doing and no one saw him working on the lists. *See id.* at paras. 42, 45.

6. Both parties hired document experts to determine when the formerly missing lists had been prepared. Standard's expert, Richard L. Brunelle, examined the level of dryness of the ink to evaluate the relative ages of the thirteen documents suitable for that type of analysis. Lexington's expert, James T. Miller, made a more comprehensive study of the missing documents and found indentations from additional lists on other lists. Neither expert could say conclusively when each of the missing lists had been prepared. However, from Brunelle's findings that three lists were prepared at the same time, Standard's concession that these three lists were prepared in May 1990, and Miller's analysis of the indentations on some of the lists, the ALJ found that five of the lists must have been prepared in May of 1990 and there was a good indication that two more were also prepared then. *Id.* at 7224-25 paras. 46, 48-49; Standard Exh. 8, 8A; Lexington Exh. 21.

7. Standard's veracity in the integration statement signed by Branham was also at issue. Standard claimed that Branham would be fully integrated at the station, working full time as general manager. It claimed that Branham's proposed integration was enhanced by his residence within the service area and his civic activities but then retracted these enhancement claims before Branham's deposition because Branham in fact lived near the service area, not in it, and had no civic activities. *Id.* at 7225 paras. 51-54. In its integration statement Standard also explained that Branham would curtail but not divest other business activities, leaving the ALJ with the impression that Branham had been somewhat active in other businesses. *Id.* In his direct case, Branham said he does not devote time to other business interests and had decided to transfer his business interests even before Standard filed its integration statement. *Id.* Branham had no explanation for these misstatements. *Id.* at para. 55.

8. From Standard's pattern of conduct, the ALJ concluded that Standard should be disqualified on two separate grounds. First, he found that Standard's rule violations -- failure to amend the FM application to report the ownership change, failure to timely file proper ownership reports, failure to comply with the public file requirements, particularly with respect to the program lists -- and its failure to take corrective action even after being put on notice "clearly demonstrate[] that it cannot be considered reliable" and "indicate a propensity for such conduct in the future." *Id.* at 7227 paras. 69-70. He concluded, "Reporting failures where, as here, there is evidence reflecting numerous and serious violations, justify Standard's disqualification." *Id.* at para. 70. He also found that Standard has shown a propensity for untruthfulness with the Commission from misrepresentations in Standard's 1988 ownership certification, which falsely stated both that Branham had reviewed the 1987 ownership report and that there was no change in the information; Standard's 1988 renewal application, which falsely certified to compliance with the public file and ownership reporting requirements;[4] James'

[3] Murray and James disagree about whether the lists for the last two quarters of 1985 and 1987 were in the file when Murray inspected it. Compare Tr. 471-473 and 325-326.

[4] Standard's principals said they had not reviewed the Commission's requirements prior to certifying. The ALJ found this to be one example of their "cavalier attitude toward the information they provide the Commission." 7 FCC Rcd at 7227 para. 73.

"false declarations in pleadings and untruthful testimony" about creation of the program lists that had been missing from WLGO's public file and which the ALJ found were created for the first time in May 1990;[5] and Standard's initial claim to integration credit which both misrepresented Standard's entitlement to enhancement credit for Branham's purported local residence and civic activities and misstated his intentions about divesting his other business interests and the time he devoted to them. *Id.* at paras. 71-75. The ALJ found "significant false statements" in virtually all of Standard's submissions to the Commission and that "Standard's principals were unwilling to be forthcoming about their many transgressions" at the hearing. *Id.* at 7228 para. 76. He thus concluded, "Standard's willful and repeated misconduct requires its disqualification." *Id.*

EXCEPTIONS

9. Standard has excepted to the ALJ's conclusions that its problems are disqualifying. With respect to the program lists missing during Murray's first visit to WLGO, Standard argues that the ALJ's conclusion is not supported by his own factual findings, the record, or reason, and that the mere fact that some lists were missing from the public file does not establish a willful intent to deceive, an essential element to a finding of misrepresentation. With respect to the rule violations, Standard argues that they were merely unintentional errors of little consequence in the Commission's overall regulatory scheme, and that the ALJ had no precedential basis for concluding that a repeated pattern of violations is a basis for disqualifying an applicant.[6] Any harm resulting from the ownership violations was felt by Standard, it argues, not the Commission, because the failure to timely report the sale of James' stock resulted in the loss of full integration credit for Branham. With respect to the erroneous claim of local residence and civic activity credit in Branham's integration proposal, Standard argues that the claim was voluntarily withdrawn before Branham's deposition and explained by the proximity of Branham's residence to the service area. In short, Standard argues, whether its transgressions are taken individually or as a whole, they are no more than minor transgressions of Commission rules and policies that its adversary has puffed into disqualifying misrepresentations. Standard asks the Board to reject what it characterizes as the ALJ's factually unsupported attempt to make new law in this area.

10. Lexington disagrees with Standard's analysis, arguing that the ALJ's findings are well supported and his conclusions consistent with Commission precedent. Lexington points out that, apart from the question of whether some program lists were copied or created for the first time after Murray's first visit to WLGO, Standard does not contest any material findings by the ALJ. It argues only that Standard's principals have been careless or inept when, in Lexington's view, the evidence shows that Standard did knowingly submit false information to the Commission about its ownership, public file, and entitlement to integration enhancement credit and it expected the Commission to rely on this information. This, Lexington points out, is the essence of an intent to deceive. Even assuming for the sake of argument that there was no actual intent to deceive, Lexington argues that Standard's pattern of false statements shows so callous a disregard for truthfulness that it is the equivalent of an intent to deceive. With respect to the program lists, Lexington argues that the testimony and expert findings were carefully reviewed in the *Initial Decision*, which correctly concluded from the extrinsic evidence that seven of the missing lists had been prepared in May 1990. Lexington also argues that the ALJ's conclusion that all of the missing lists were prepared at the same time is warranted by the fact that additional lists were also missing when Murray visited the station. Finally, Lexington submits, given the Commission's concern about an applicant's reliability in *Character Policy Statement*, 102 FCC 2d 1179, 1209-10 (1986), Standard's numerous rule violations preclude awarding Standard a second broadcast station.

DISCUSSION

11. In its *Character Policy Statement*, the Commission emphasized that "the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest." 102 FCC 2d at 1210. The other is reliability in complying with the Communications Act and Commission requirements. *Id.* at 1209-10. The reason is simple. If the Commission cannot believe and rely on what applicants and licensees tell it, it cannot maintain the integrity of its processes.[7] Thus, applicants' or licensees' intentional deceptions of the Commission by providing either false information (misrepresentation) or incomplete and misleading information (lack of candor) are

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[5] The ALJ specifically found that James' explanations lacked credibility. *Id.* at para. 74.

[6] Among Standard's violations of the public inspection file rule, 47 CFR 73.3526(a)(6), was Standard's failure to include a copy of *The Public and Broadcasting - A Procedure Manual*, in its public inspection file. The Commission recently remitted a forfeiture imposed on another licensee for violating the same provision because "the manual was published in 1974 and contains some information that is out-of-date." *Letter to Richard Hildreth, Esq.*, 7 FCC Rcd 6292, 6292 (Field Op. Bur. 1992). In light of this, we attach no significance whatsoever to Standard's failure to include this *Manual* in its file.

[7] The Board explained in *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1173 para. 114 (1990):

> Though the Commission does not lightly disqualify any applicant for misrepresentation or lack of candor, *TeleSTAR*, 2 FCC Rcd at 2860, the case law and the *Character Policy Statement* are at pains to stress that the agency's demand for unalloyed candor is its *sine qua non* for licenseeship, because it is primarily upon a licensee's uninvestigated representations that this agency must routinely rely. The Commission has an exceedingly limited budget and staff, and its everyday resources even for spot-checking are minuscule compared to the enormous industries under its purview. Practically its entire system of regulatory control over the vast and vital telecommunications industry is based, of utter necessity, on a system that presupposes the honor of its regulatees, much the way the courts must largely trust in the representation of lawyers appearing before them. When that trust is ruptured, all else falls asunder, and privileges may be lost if the deceit is substantial. At the FCC, that privilege has been the license sought, or the renewal thereof. [Citations omitted.]

Recon. denied, 5 FCC Rcd 3727 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2604 (1991).

viewed as "serious breaches of trust" for which the Commission has broad discretion in choosing remedies and sanctions. *Id.* at 1211. Where inaccurate information results from an intent to deceive rather than carelessness, exaggeration, faulty recollection, or merely falling short of the punctillio normally required by the Commission,[8] the remedy may be total disqualification,[9] even if the fact concealed does not appear to be particularly significant.[10] In making its determination, the Commission will look at all of the facts of the case.

12. Having reviewed the record, we must deny Standard's exceptions to the ALJ's conclusion that Standard made repeated misrepresentations concerning the preparation of its program lists. *See* 7 FCC Rcd at 7227 para. 74. The ALJ's conclusion is based on his underlying findings that Standard's explanations were false and that it had a motive for providing false information about the lists, both of which are necessary elements of the finding of misrepresentation. Standard challenges both of these findings, but our review of the record shows that both are supported by the evidence, and that Standard has failed to meet its burden of establishing its qualifications by a preponderance of the record evidence.[11]

13. Standard's primary argument is that the ALJ erroneously concluded in paragraph 74 that *all* of the missing program lists were created for the first time in May 1990, a conclusion not supported by the ALJ's own findings. We do not read the ALJ's conclusory language in paragraph 74 as broadly as Standard does for, as Standard points out, the ALJ found in paragraph 49 that five and possibly seven of the thirteen missing lists had been prepared in May 1990. *Id.* at 7225. This finding included the three lists Brunelle said had been written at the same time and Standard admitted were prepared in May 1990 and additional lists bearing the indentations analyzed by Miller. This finding is consistent with the ALJ's finding in paragraph 20 that "the evidence indicates that at least some of the quarterly lists were not timely placed in the public file but were created in May of 1990." *Id.* at 7222. Although the ALJ broadly referred to "these lists" in paragraph 74, he did so in the context of his earlier findings and in specific reliance on the testimony of the two experts regarding the "time and sequence in which these lists were prepared." *Id.* at 7227. We read the ALJ's conclusion in paragraph 74 as applying only to the five to seven lists he found were not timely placed in the WLGO public file. The critical question before the Board, however, is not whether all of the lists were created in May 1990 but whether *any* of the lists written in May 1990 were created then or merely copied from timely prepared lists, as Standard has maintained throughout. The evidence supports the conclusion that James created at least three lists in May 1990 and, therefore, that Standard's assertions to the contrary were false.

14. There is no dispute that thirteen lists were not included in the WLGO public file when Murray first visited the station but were in the file when she returned. There also is no dispute that at least some of the lists were written in May 1990, for Standard's questioned document expert, Brunelle, determined that three of the originally missing program lists were written at the same time, and Standard admits they were written in May 1990.[12] *See* Standard Exh. 9, p. 1. The analyses of Brunelle and Lexington's document expert, Miller, also suggest that additional documents were likely prepared at the same time, although how many documents is not certain.[13] The record also shows that James was concerned about an inspection of its public file by Lexington and, in anticipation of such an inspection, had pulled program lists to review them just a day or two before Murray's first visit. 7 FCC Rcd at 7223 paras. 32-33; Standard Exh. 9, Attach. A (First James Declaration); Tr. 309.[14] James did not offer Murray the lists he had taken from the public file when she asked to see the file because, he said, he thought she was a student working on a school assignment. But, he did not learn she was a student until she began photocopying the file -- an hour after she began reviewing the file, and his previous limited experience with students was with students from a different school at least four or five years earlier. 7 FCC Rcd at 7223 para. 33; Standard Exh. 9, Attach. A; Tr. 352. Any evidence supporting James' version of the copying of the lists was, according to James, thrown away. 7 FCC Rcd at 7224 para. 45. No one saw him working on the lists, and he told no one about copying them, including counsel, until confronted

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[8] However, carelessness "so 'wanton, gross, and callous, and in total disregard of [the licensee's] obligations to the Commission, as to be equivalent to an affirmative and deliberate intent'" may be disqualifying. *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 para. 16 (1978), quoting *Tipton County Broadcasters*, 37 FCC 197, 291 (1963), *aff'd*, 37 FCC 191 (1964); *see generally Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd at 1173 para. 116 (Board found pattern of neglect in failing to file issues/problems lists throughout renewal period so strong as to appear "nearly willful" without deciding whether violations by themselves were disqualifying). *Cf. Valley Broadcasting Company*, 4 FCC Rcd 2611, 2618 para. 36 (Rev. Bd. 1989) (reporting failures will not warrant disqualification absent evidence of intent to conceal information or "other evidence reflecting violations so numerous and serious as to undermine the applicant's responsibility to be a licensee."), *cited in David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1259 (D.C. Cir. 1991).

[9] *See generally, e.g., Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), *modified on other grounds*, 93 FCC 2d 127 (1983).

[10] "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC v. WOKO*, 329 U.S. 223, 227 (1946), *quoted in Character Policy Statement*, 102 FCC 2d at 1210 n.77. *See generally Richardson Broadcast Group*, 7 FCC Rcd 1583, 1585 (1992) (application denied where applicant intentionally gave false testimony about her age, claim of continuous local residence was not true, and applicant was evasive).

[11] For a discussion of the preponderance of the record evidence as the appropriate evidentiary standard in administrative law cases, see *Steadman v. SEC*, 450 U.S. 91 (1981).

[12] These are the program lists for 1987-4, 1988-4, and 1989-3. Standard Exh. 8, p. 5.

[13] Miller found that some program lists bore indentations from other lists. Indentations from 1988-3 were on 1988-4; from 1988-4 on 1989-1; from 1989-1 on 1989-2; and from 1989-3 on 1989-4. Lexington Exh. 21, p. 2. 1988-3 and 1989-1 were prepared at the same time, but not at the time 1989-4 was prepared. Joint Stipulation. See also the ALJ's discussion of the expert evidence concerning the lists, 7 FCC Rcd at 7225 para. 49. Miller found indentations on additional lists, but either the indentations were too indistinct to identify the source or the affected lists appeared older. *See* Lexington Exh. 21, p. 2.

[14] Counsel had spoken with Branham who then asked James to check the file. Although James was not sure Branham had told him why the file should be checked, James said: "[T]o me it would be a foregone conclusion that it was in preparation for someone to come by and check them, in relationship to the application." Tr. 295.

with Murray's declaration that she had found impressions of some lists on others. He acknowledged copying the two lists Murray had discovered and, when presented with Brunelle's opinion that a third list had been written at the same time, acknowledged he might have copied a third one. He submitted two Declarations in response to Lexington's requests to enlarge the issues and a third one to clarify earlier statements after his deposition had been taken shortly before the hearing. Although, as Standard argues, the declarations are not glaringly inconsistent, discrepancies among them do raise questions. When cross-examined about the declarations, James' answer was that the first two declarations had been prepared by counsel and he had only skimmed them, even though he had declared he had made both under penalty of perjury, initialled each page, and signed them both. He consistently said he could not remember clearly how he had made the copies of the program lists or how many he had copied, even though Lexington's questions about them were raised only shortly after this had happened. All of these factors, when considered together, show that it is indeed probable that James created at least three of the missing lists in May 1990.

15. Standard has argued that Brunelle's tests yielded results "consistent" with its view of the case:[15] that many of the program lists were prepared on the dates shown on them. This exaggerates the extent of Brunelle's findings and ignores the point that his results are also consistent with other possibilities. *See id.* at paras. 46-47. Of significance here, neither expert sheds any light on the critical question: whether the lists prepared in May 1990 were copied from earlier-prepared lists or were created in May 1990. Even assuming that many of the lists missing during Murray's first visit to WLGO were in fact timely prepared, this would not be a basis for overturning the ALJ's conclusion with respect to the three lists Standard has acknowledged were prepared in May 1990.[16] The finding that at least three lists were created in May 1990 is sufficient to support the conclusion that Standard's explanation about those three lists is false.[17]

16. Clearly, in drawing this conclusion from the evidence, the ALJ was swayed by his credibility finding that James' explanations are "not believable" and "not accepted" and that his testimony was "untruthful." *Id.* at 7227 para. 74. Because he did not believe James' explanation, he did not credit it.[18] As a general matter the Commission gives deference to the credibility findings of its administrative law judges unless such findings are patently in conflict with the record evidence.[19] Standard argues in this case that the bases for these findings given by the ALJ in para. 74 -- that James made "constantly shifting explanations," "inconsistent declarations," furnished "false declarations in pleadings" and gave "untruthful testimony" about these matters -- are not supported by his findings of fact. We disagree. As described above, James repeatedly demonstrated a capacity for rationalization, explaining a little more about the missing lists and his earlier explanations each time new questions arose, until finally he explained he had not carefully read his earlier explanations given under penalty of perjury! For example, over the course of three declarations and his testimony, James revised his explanation of what he was doing with the missing lists from checking carefully for errors, to spot checking and correcting errors, to correcting grammar and syntax problems, to merely copying for legibility. James was never certain how many lists he had copied, asserting that there were perhaps two, but agreeing to whatever number seemed to be supported by the strongest evidence, *i.e.*, the two lists from which Murray found impressions, which he acknowledged in his Second Declaration, and the third list Brunelle found had been written at the same time, which he acknowledged in his Third Declaration and his cross examination. *See id.* at 7224 para. 41. James had no explanation for how the indentations Miller found came about and, as the ALJ found at *id.* para. 43, gave conflicting explanations of his copying process.[20] The elapsed time between the

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[15] Standard Exh. 8, pp. 4-5, Exh. 8A; *see* Lexington Exh. 21, p. 2 (Miller found that lists dated 1988-2 through 1990-2 as a group differed in appearance from those dated 1984-1 through 1988-1 and that those on older paper "may have been written earlier than 1988, and some on the purported dates").

[16] Two of the three lists prepared in May 1990 were among the program lists in the two series of lists showing indentations. Because of the evidence about the indentations, the ALJ believed that at least five and as many as seven lists had been created in May 1990. 7 FCC Rcd at 7225 para. 49.

[17] Standard argues that, if some of the lists had been timely prepared, one should conclude that all were, for it makes no sense that it would have prepared some but not all lists on time, and it makes no sense that it would remove thirteen lists from the file if only three were untimely. But, the inference that some of the lists were created in May 1990 is not unreasonable on the record here. There is insufficient evidence to establish that James had any procedure to assure that he *always* timely created the quarterly program lists, so assuming the possibility that some were not timely created is not unreasonable. Indeed, James said his deteriorating physical condition caused him to question his earlier activities. Tr. 319-21. The disarray in which James said the public file was kept (Tr. 310) would explain the need to pull lists to determine whether the file was complete. *See* Tr. 297.

[18] The ALJ's credibility finding is significant here, for the only evidence contradicting the inferences the ALJ has drawn from the record is James' testimony about copying a few of the missing lists and disposing of the originals. As uncorroborated, self-serving testimony, this would ordinarily be entitled to little weight. But, if the ALJ does not believe it, he "may simply disregard it." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984).

[19] For a discussion of the Commission's treatment of credibility findings, see *Naguabo Broadcasting Company*, 6 FCC Rcd 912, 919 (Rev. Bd.), *modified on other grounds*, 6 FCC Rcd 4879 (1991), *modified on recon.*, 7 FCC Rcd 1696 (1992).

[20] James first explained:

> He opened the folder, placed the list that was to be recopied on top and copied it over on a clean sheet of paper. [Tr. 341, 373.] There were no papers scattered on the desk. Tr. 341-342. However, when asked to explain how the indentations . . . appeared on the lists, James stated that there was "one there and I put another piece of paper on top of it and wrote over it." Tr. 342. The "one" that James refers to is not blank paper, but rather, a list that had been, according to James, timely prepared. Tr. 372. This explanation conflicts with his prior statement that all of the lists [other than the new copies] were in the manila folder.

7 FCC Rcd at 7224 para. 43. Furthermore, James testified that the public file was not kept in chronological order, and he did not put it in order until after copying some of the lists. Tr. 310, 313, 336. Yet, although we do not know the dates on which the

copying and the questions about it was not long, and James had focused on the program lists when he checked the public file "because he considered the lists to be 'something very personal for me. . . .' Tr. 313-314." 7 FCC Rcd at 7223 para. 39. Thus, it is not unreasonable to expect a clearer recollection than if the lists project had been of less interest or more remote in time. Although James' various explanations for the missing lists were not starkly contradictory, the ALJ's weighing of the discrepancies in and supplements to James' explanations from the First Declaration through his hearing testimony is appropriate to his analysis of James' credibility, and the inference he drew from this about the veracity of James' basic explanation of the missing lists was not unreasonable in light of the record as a whole. This record includes James' admitted inattention to veracity with regard to Standard's renewal application certification[21] and his First and Second Declarations about the program lists, which, when pushed, he said he had only "skimmed." *See* Tr. 347, 359.[22]

17. At oral argument counsel for Standard claimed that the ALJ's credibility finding is not entitled to deference because he did not make specific demeanor findings, even though he found James' testimony "untruthful." 7 FCC Rcd at 7227 para. 74. But, the trier of fact's view of a witness' credibility is not limited to observations of the sweatiness of a witness' brow or the shiftiness of a witness' eyes when coping with direct or cross examination. "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963). Record evidence of a witness' prior inconsistent statements and general character for veracity inform the trier of fact about a witness' credibility as do contradictions to the witness' testimony. *See, e.g.*, Wright & Gold, Federal Practice and Procedure: Evidence Section 6094.[23] A witness' demeanor while giving testimony provides the trier of fact further insight into the witness' credibility, but the lack of specific demeanor findings when other reasons are given for the ALJ's credibility finding, as were given here, is not a basis for disregarding it or diminishing its weight.[24] The ALJ's failure to believe James is not patently inconsistent with the record evidence or separate from it; it follows from the evidence and inconsistencies the ALJ perceived in James' story, including his testimony.[25]

18. In addition to attacking the ALJ's finding that its principals made false statements, Standard argues that a willful intent to deceive is essential to a conclusion that an applicant is disqualified for misrepresentation. Standard argues that the record here does not support a conclusion that James intentionally sought to deceive anyone. Intent is a factual question that, like other factual questions, can be found from evidence that affords a reasonable inference. *See California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985). It can be found, for example, from a showing of motive or "a logical reason or desire to deceive." *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1100 para. 18 (Rev. Bd. 1982); *see Imagists*, 6 FCC Rcd 7440, 7445 para. 22 (Rev. Bd. 1991) (motive or intent to deceive is essential element); *Coastal Bend Family Television, Inc.*, 94 FCC 2d 648, 659 para. 16 (Rev. Bd. 1983) (motive found from desire to avoid financial issue)(subsequent history omitted). The ALJ described a motive for providing false explanations when he found that the missing lists were made "in a vain effort to escape culpability." 7 FCC Rcd at 7227 para. 74. Standard was faced with a motion to enlarge the issues in the comparative FM proceeding because the lists were missing from the WLGO public file. Branham had been alerted by counsel to have the public file in order in case Lexington came to inspect it, and James had assumed it would be inspected in Lexington's search for ammunition in the comparative case. Tr. 294. James' testimony that for several years he had kept the file in order in anticipation of a visit from an FCC inspector shows his awareness that compliance with the rule is important. Tr. 312. Fear of culpability if caught is sufficient motive to support the ALJ's conclusion that James' false statements constituted misrepresentation. This finding that Standard had a motive to deceive the Commission distinguishes this case from *Safe Broadcasting Corporation*, 6 FCC Rcd 6548 (Rev. Bd. 1991), *rev. denied*, 7 FCC Rcd 3440, *recon. denied*, 7 FCC Rcd _____ (FCC 92-505, released Nov. 20, 1992), cited by Standard for the proposition that the mere fact that some lists were missing from the public file is a technical violation, which does not mandate disqualification. In *Safe*, photocopies of old is-

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lists were created, we do know from the indentations showing on some of the lists that the indented lists were prepared in chronological order (if new lists were written over blank paper) or reverse chronological order (if new lists were written over existing lists as the parties and the ALJ appeared to assume through the hearing), and that there are lists in the sequence of indented lists that James admits he copied.

[21] Branham also showed little attention to veracity in his ownership certification and integration statement. *See* 7 FCC Rcd at 7222 paras. 26, 28-30, 7225 paras. 51-55.

[22] The certification problems do not establish the truth or falsity of Standard's explanation about the program lists, but they do show that James' representations are unreliable.

[23] Wright & Gold also list proof of bias and proof attacking a witness' capacity to perceive, recall, or narrate as additional factors affecting credibility.

[24] The debate in legal and judicial circles as to the reliability of recorded demeanor findings is described in *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987). Ultimately, the Commission affirmed the finding of applicant misrepresentation in that case despite the fact that the ALJ had made no specific demeanor findings. *See* 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989) (table).

[25] In *Pepper Schultz*, 4 FCC Rcd 6393, 6406 n.43 (Rev. Bd. 1989) (subsequent history omitted), which Standard's counsel referenced during oral argument, the Board did not say that demeanor is the only basis for finding that an applicant lacks credibility. In that case the Board noted that the ALJ had not made demeanor findings and had given no other basis for doubting an applicant's credibility on a point. During the hearing in that case, the ALJ had noted that the witnesses had answered questions honestly, he had not designated a misrepresentation/lack of candor issue, and he had made no further reference or negative finding about the principals' truthfulness and reliability beyond a single comment in his decision that the Board took as a rejection of the applicant's legal position rather than a credibility finding. In other words, in *Pepper Schultz*, an adverse demeanor finding would have been inconsistent with the record. The ALJ's treatment of James, whose veracity is at issue here, is far different from the treatment of the principals in *Pepper Schultz*.

sues/program lists were used as new lists and placed in the station's public file and also used as evidence of the station's past broadcast record, although these were not checked against station records and contained errors. The station took corrective action when it learned of the errors and admitted its negligence to the Commission. The ALJ found that the station had no motive to falsify the lists, its witnesses were truthful, and the problem arose from negligence. *Accord Arkansas Educational Television Commission*, 6 FCC Rcd 478, 480 para. 10 (1991).

19. The misrepresentation regarding creation of at least three of the program lists found by the ALJ is sufficient for finding that Standard is disqualified for the new FM station it seeks.[26] *See FCC v. WOKO*, 329 U.S. 223, 227 (1946); *Character Policy Statement*, 102 FCC 2d at 1210. When considering this along with the record of Standard's "cavalier attitude" toward the accuracy of its submissions to the Commission in Branham's ownership certification and integration claim and James' renewal application certification,[27] [28] we cannot find that Standard has shown a propensity for truthfulness that would afford the Commission any basis for relying on information it submits. *See generally TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2863 para. 20 (1988) (careless certification practices raise questions about reliability of future representations and must be considered as part of evidence reflecting adversely on applicant's qualifications). We cannot, therefore, make the finding that "the public interest, convenience, and necessity will be served by the granting" of Standard's application, as required by 47 U.S.C. 309(a), so we are affirming the ALJ's ultimate conclusion that Standard is disqualified in this proceeding for a new FM broadcast station.[29] Because Standard does not have the basic qualifications for a grant, we need not consider its exceptions going to the ALJ's findings and conclusions regarding its comparative qualifications. "An

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[26] The ALJ found that the degree of carelessness shown by Standard's overall pattern of conduct, including the program lists problem, was "so wanton, gross and callous, and in total disregard of its obligations to the Commission, as to be equivalent to an affirmative and deliberate intent." In light of the finding that the misrepresentations regarding the three program lists is disqualifying, particularly when considered in the overall context of Standard's violations, the Board need not determine whether Standard's pattern of rule violations is a separate basis for disqualification. *See* note 8, *supra*.

[27] 7 FCC Rcd at 7227 para. 73. Standard has argued that its carelessly inaccurate certifications should not be disqualifying. According to Standard, the record contains no evidence that it attempted to mislead the Commission about its ownership structure, and such problems are not ordinarily disqualifying in the absence of a motive or intent to mislead or conceal. While we need not decide whether these problems would, by themselves, amount to disqualifying misrepresentations, we note that the Commission first learned about Standard's ownership change from Standard's integration statement (which, however, contained other errors with respect to Standard's entitlement to integration enhancement credit; *see* 7 FCC Rcd at 7225). Branham's position as controlling stockholder was unchanged by his acquisition of James' stock. James continued to serve as an officer and director of Standard, so Standard's management was unchanged. Standard had no reason to hide Branham's increased stock interest and James' relinquishment of his interest -- or the possibility that James might reacquire it. Standard had nothing to gain from its failure to report the change; instead, as Standard has argued here, its position in this comparative FM proceeding was affected negatively by its failure to report the change before the "B cutoff," for the Commission's policy against comparative upgrading prevented Standard from claiming full quantitative credit for Branham's ownership interest.

Standard also has argued that it was not required to report James' oral option to reacquire his stock. As the Board noted in *Barry Skidelsky*, 7 FCC Rcd 1, 10, n.2, *recon. denied*, 7 FCC Rcd 1392 (Rev. Bd. 1992), neither the application form used at the time Standard applied (FCC Form 301, Oct. 1986) nor its instructions clearly required an applicant to report outstanding convertible interests in the applicant. The questions on the form and the interests subject to ownership reporting are linked to the Commission's multiple ownership rules under which "warrants, debentures, and other convertible interests," including options, are not considered cognizable ownership interests unless and until converted. *Ownership Attribution*, 97 FCC 2d 997, 1021-22, 1028 para. 63, 1030 para. 68 (1984); *see* 47 CFR 73.3555 note 2(f); *see generally* 73.3615(a)(3)(i)(C). Although Lexington argues to the contrary, *Riverside Broadcasting Co., Inc.*, 53 RR 2d 1154 (1983), on which it relies was decided before the attribution rules governing this case were adopted in *Ownership Attribution*. The likelihood that an applicant would exercise convertible interests would be relevant to the comparative diversification and ownership/integration analysis, however. *See Doylan Forney*, 5 FCC Rcd 5423, 5427 para. 30 (1990) (subsequent history omitted); *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1491 (1986), (subsequent history omitted) and its progeny, *e.g.*, *Emision de Radio Balmeseda, Inc.*, 7 FCC Rcd 3852, 3853 para. 8 (Rev. Bd. 1992); *Barry Skidelsky*, 7 FCC Rcd at 3-4. Here, James' position as an officer and director is reportable (and was reported) and Standard is not seeking integration credit for the ownership represented by James' option. Thus, little significance attaches to the possibility that he might reacquire a noncontrolling stock interest in Standard in the future.

[28] *See generally, e.g., Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd at 1173 para. 116.

[29] Standard asserts that evidence of its issue-responsive programming has not been challenged. The challenges were to the truthfulness of its representations about the preparation of its program lists, not whether programming reflected in its program lists or other issue-oriented programming had been broadcast. Standard sought neither comparative enhancement for an unusually good past broadcast record at WLGO, *see Comparative Policy Statement*, 1 FCC 2d at 398, nor a meritorious programming issue, and only the physical features, not the content, of its program lists were examined in this proceeding. Even if its program lists (and the accompanying logs for one quarter, Standard Exh. 10) had been examined for their content, such a showing would not mitigate the evidence here of misrepresentation. *Character Policy Statement*, 102 FCC 2d at 1211 n.79. For a discussion of when meritorious programming can serve as a mitigating factor and when it cannot, see *KQED, Inc.*, 3 FCC Rcd 2601, 2607 (Rev. Bd. 1988); *see also Continental Broadcasting, Inc. v. FCC*, 439 F.2d 580, 584 (D.C. Cir.), *cert. denied*, 403 U.S. 905 (1971); *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd at 1173 para. 119; *Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423, 425 n.3 (1980). The cases Standard cites regarding the stewardship of renewal applicants are irrelevant here. *See Arkansas Educational Television Commission*, 6 FCC Rcd at 480 (issue-oriented programming relevant in evaluation of renewal applicant's compliance with pre-deregulation ascertainment requirement); *License Renewal Applications (Philadelphia, PA)*, 5 FCC Rcd 3847 (1990) (no substantial and material questions of fact raised regarding adequacy of renewal applicants' issue-oriented programming); *KPRS Broadcasting Corp.*, 54 RR 2d 1397 (1983) (licensee's minority-oriented public affairs programming not so minimal as to warrant denial of renewal).

agency, like a court, need not decide questions which are not relevant to its decision." *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960), *quoted in Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2296 para. 3 (1991).

CONCLUSION

20. As the only qualified applicant remaining in this proceeding, Lexington is entitled to grant of its application.

21. ACCORDINGLY, IT IS ORDERED, That the application of Lexington Communications, Ltd. (File No. BPH-870629MV) for a construction permit for a new FM station at Lexington, South Carolina, IS GRANTED.

22. IT IS FURTHER ORDERED, That the application of Standard Broadcasting, Inc. (File No. BPH-870624MI) IS DENIED.

23. IT IS FURTHER ORDERED, That the Motion for Acceptance of Addenda filed by Standard Broadcasting, Inc. on January 27, 1992, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONET, INC. File No. I-T-C-92-227

Application for Authority to
provide international television
service via the TDRS-41 Satellite

ORDER AND AUTHORIZATION

Adopted: December 4, 1992; Released: December 16, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by MicroNet, Inc. (MicroNet), pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-227 IS GRANTED, and MicroNet is authorized to establish channels of communication between its Glenwood, New Jersey earth station (WB 20) and the TDRS-41 satellite for the provision of international television service between the U.S. and currently authorized points of communications listed in Appendix A as well as those points which the Commission may authorize in the future to be served by the TDRS-41 satellite.

3. IT IS FURTHER ORDERED that the initial number of channels authorized herein for the provision of international television service is two (2) 36 MHz video channels.

4. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MicroNet and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Austria
Bahamas
Belgium
Canada
France
Germany
Ireland
Israel
Jamaica
Luxembourg
Mexico
Netherlands
Portugal
Sweden
Switzerland
United Kingdom

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-92-247

Application for authority to lease and operate facilities for direct service between the U.S. and Aruba, Honduras, Cayman Islands, Uruguay and Netherlands Antilles.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 7, 1992; Released: December 16, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Aruba, Honduras, Cayman Islands, Uruguay and Netherlands Antilles[1] by Sprint Communications Company, L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-247 IS GRANTED, and Sprint is authorized to:

a. lease from Comsat and operate 75 voice-grade satellite circuits between the Franklin, New Jersey earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations furnished by Sprint's correspondents;

b. use the facilities in a above to provide Sprint's regularly authorized services, including switched voice service, between the U.S. and Aruba (15 voice-grade circuits), Cayman Islands (30 voice-grade circuits) Uruguay (12 voice-grade circuits) and Netherlands Antilles (18 voice-grade circuits);[2]

c. lease from Telmex in Mexico a one-half interest in and operate 30 voice-grade digital microwave circuits between the U.S.-Mexico border and the Mexico-Guatemala border;

d. lease from Guatel in Guatemala a one-half interest in and operate 30 voice-grade digital microwave circuits between the Mexico-Guatemala border and the Guatemala-Honduras border; and

e. use the facilities in c and d above to provide Sprint's regularly authorized services, including switched voice service, between the U.S. and Honduras.[3]

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Sprint and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that our authorization for Sprint to provide private lines is limited to the provision of such private lines only between the U.S. and Aruba, Honduras, Cayman Islands, Uruguay and Netherlands Antilles respectively -- that is, private lines which originate in the U.S. and terminate in those countries or which originate in those countries and terminate in the U.S. In addition, Sprint may not -- and Sprint's tariff must state that Sprint's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, FCC 92-517, Released November 27, 1992.

6. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any

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[1] In its application Sprint requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Aruba, Honduras, Cayman Islands, Uruguay and Netherlands Antilles and points beyond. We note that should Sprint obtain any interest in facilities beyond Aruba, Honduras, Cayman Islands, Uruguay and Netherlands Antilles for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for Sprint to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] Aruba-Sericio di Telecommunication di Aruba (SETAR), Cayman Islands-Cable & Wireless (WI) Ltd Islands, Uruguay-ANTEL, Netherlands Antilles-Landsradio.

[3] Honduras-Hondutel

concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.01(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petition for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

HUGHES COMMUNICATIONS GALAXY, INC. — File Nos. ITC-91-217, ITC-91-219

For Authority to Make Available Channels of Communication via the Galaxy VII (H) and Galaxy IV (H) Domestic Communications Satellites for Transmissions To and From Various Transborder Locations

ORDER AND AUTHORIZATION

Adopted: December 9, 1992; Released: December 16, 1992

By the Chief, International Facilities Division:

1. By the above-referenced application Hughes Communication Galaxy, Inc. (Hughes) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide one-way and two-way transborder services between the United States and Mexico and the United States and Canada, and one-way services from the United States to Latin America and the Caribbean, over the Galaxy VII (H) and Galaxy IV (H) satellites. The application was placed on public notice on September 25, 1991. No comments were received.

2. Hughes has been authorized to launch and operate its Galaxy VII (H) satellite to replace its Galaxy VI satellite at C-band, and its SBS 4 satellite at Ku-band, at the 91^0 W.L. orbital location.[1] Similarly, Hughes has been authorized to consolidate its previously-authorized Galaxy A (R) and Galaxy IV-R satellites into a single hybrid satellite -- Galaxy IV (H) -- to be located at 99^0 W.L.[2] Hughes now requests authority to utilize capacity on Galaxy VII (H) and Galaxy IV (H) for services identical to those previously authorized under the Commission's transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement.

3. The services requested by Hughes for its new satellites are consistent with the types of services authorized under the Commission's transborder policy.[3] We also find that the services requested by Hughes are in accord with current INTELSAT Article XIV(d) consultations,[4] and therefore will cause neither technical interference nor significant economic harm to the global satellite system. Since all prerequisites for issuance of final authority have been met, we conclude that grant of the instant request will serve the public interest.

4. Accordingly, IT IS ORDERED that application File Nos. ITC-91-217 and ITC-91-219 ARE GRANTED, and Hughes is authorized to utilize transponder capacity on Galaxy VII (H) and Galaxy IV (H) for the provision of (i) one-way and two-way services between the United States and Canada and between the United States and Mexico, and (ii) one-way services from the United States to points in Latin America and the Caribbean which have been consulted under Article XIV(d) of the INTELSAT Agreement.

5. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

6. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] *See Hughes Communications Galaxy, Inc.*, 6 FCC Rcd 72 (1991). Galaxy VI is a temporary replacement for the Westar III spacecraft at 91^0 W.L. *See Assignment of Orbital Locations*, 3 FCC Rcd 6972 (1988). The Westar III and SBS 4 satellites were assigned to Hughes pursuant to Commission orders. *See Western Union Corp.*, 3 FCC Rcd 6792 (1988); *International Business Machines Corp.*, 5 FCC Rcd 1655 (1990).

[2] *See Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 3423 (1990).

[3] *See Hughes Communications Galaxy, Inc.*, 7 FCC Rcd 2220 (1992).

[4] Letter from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, United States Department of State to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (September 18, 1992). *See* BG-94-3, BG-94-81, AP-15-24, AP-15-34, BG-94-43 (Rev. 1), BG-94-87 (+ Err. 1), BG-94-88 (+ Err. 1)). Hughes must, of course, operate its system within the technical parameters consulted with INTELSAT.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 23, 1992

Released: December 16, 1992

CERTIFIED MAIL NO. P 295 670 783
RETURN RECEIPT REQUESTED

Kathryn R. Schmeltzer, Esq.
Fisher, Wayland, Cooper and Leader
Suite 800
1255 23rd Street, N.W.
Washington, D.C. 20037-1125

Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Radio KCCT, Inc.
on June 9, 1992.
3153462-92009

Dear Ms. Schmeltzer:

This is in response to your Petition for Reconsideration submitted to the Federal Communications Commission (FCC) under Section 1.106 of its rules on July 9, 1992. 47 C.F.R. Section 1.106. You requested reconsideration of a $4,250 monetary forfeiture penalty that the FCC's Kingsville, Texas Office had assessed against Radio KCCT, Inc., Corpus Christi, Texas, for violating the FCC's rules.

As explained below, we are reducing the $4,250 monetary forfeiture penalty to $1,600, and we are affirming this reduced penalty.

Our records show that on May 5, 1992, an FCC engineer inspected radio station KCCT (AM). During his review of KCCT's public inspection file, he could not find statements certifying that the station had complied with the FCC's requirements relating to filing for renewal of the station's license, a copy of every application tendered for filing, and records concerning broadcasts by candidates for public office during 1992. Also, Emergency Broadcast System (EBS) tests had not been transmitted between January 12 and February 12, 1992, and the station log did not reflect EBS tests received during four weeks in early 1992.

On May 7, 1992, the FCC's Kingsville Office issued KCCT a Notice of Apparent Liability for a "willful and/or repeated" violation of Sections 73.3526 and 73.1820(a)(1)(iii) of the FCC's rules. 47 C.F.R. Sections 73.3526 (specifies documents to be kept in the local public inspection file) and 73.1820(a)(1)(iii) (requires station log to record EBS tests). KCCT responded on June 4, 1992. On June 9, 1992, the FCC's Kingsville Office issued KCCT a Notice of Forfeiture for a $4,250 monetary forfeiture penalty. This penalty was set after adjusting the penalty downward based on the minor violation criterion contained in the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR 2d 823 (1991), *modified in part on reconsideration*, FCC 92-212 (May 14, 1992) (*Policy Statement*). The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of The Communications Act of 1934. 47 U.S.C. Section 503(b).

KCCT states a number of reasons why the monetary forfeiture penalty should be reduced or eliminated. First, KCCT explains that the public inspection file is not required to contain "every application tendered for filing" and that it was only required to have its 1990 renewal application in the file which was there. We agree, and the forfeiture for this alleged violation is canceled.

Second, KCCT states that the public inspection file lacked records concerning broadcast by candidates for public office because these records were being updated in another room at the station. The forfeiture for this violation is also canceled because, although these records were not in the public inspection file, they were provided to the FCC inspector during the early stages of his inspection. The records in the public inspection file, however, should "be available for immediate inspection" and a two hour delay may result in a violation. *Thomas P. Brunnock*, 50 RR 2d 1313, 1314a (Broadcast Bureau 1982). If there is a significant delay in providing necessary records during an FCC inspection, there is the concern that the records may have been fabricated to avoid a violation of the FCC's rules.

Third, KCCT states that although it failed to place in the public inspection file certification that it had complied with the FCC's requirements relating to filing for renewal of its license, it otherwise followed the FCC's rules regarding the renewal of its license and that the failure to place the required certification in the public inspection file was "a purely ministerial act." Nevertheless, the failure to have this certification in the public inspection file was a violation of the public inspection file rule, although a minor violation. The "omission of required forms ... implies the type of indifference to Commission Rules that justifies the imposition of forfeitures ... . [C]lerical errors in failing to file required forms" are subject to forfeiture penalties. *Standard Communications Corporation*, 1 FCC Rcd 358 (1986).

Regarding the EBS violations, KCCT explains that the violations were inadvertent and have been corrected. So-called inadvertent violations are subject to forfeiture penalties. *See Standard Communications Corporation*, 1 FCC Rcd 358 (1986). Furthermore, remedial action to correct a violation, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

Finally, KCCT states that the monetary forfeiture penalty should be adjusted downward in accordance with the FCC's *Policy Statement* because of its good faith during the inspection and history of overall compliance with the FCC's rules. It is anticipated that a station will respond to an FCC inspector's questions and requests for documents that are within the proper scope of an FCC inspection and will, in general, cooperate during an inspection. The FCC's rules, for example, require station records and logs to "be made available to any representative of the FCC upon request." 47 C.F.R. Sections 73.1225 and 73.1226. Since stations are required to cooperate with an FCC initiated inspection, it is anticipated that a downward adjustment of a penalty for "good faith or voluntary disclosure" during an FCC initiated inspection will be rare. A situation where the downward adjustment criterion of good faith or volun-

tary disclosure may be applied involves a station initiating contact with the FCC regarding a problem, and the FCC subsequently determining that there are rule violations.

Regarding a KCCT statement that it has "a history of overall compliance," we note that this is the first time that KCCT has been inspected by the FCC, therefore, there has not been much of an opportunity to develop a history of either compliance or noncompliance. However, we also note that we have not received complaints regarding KCCT. Thus, there is lack of evidence regarding past noncompliance with the FCC's rules, and this is a factor in our decision.

Since the forfeiture for two of the three alleged violations regarding the public inspection file are canceled and the third violation is minor, which the FCC's Kingsville Office has already largely taken into account, and because of lack of evidence concerning past noncompliance with the FCC's rules, the monetary forfeiture penalty is reduced from $4,250 to $1,600.

Please request your client to submit the $1,600 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 3153462-92009 should be placed on the check and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Monetary forfeiture penalties not paid within 30 days may be referred to the U.S. Attorney for collection through a civil suit as provided in Section 504(a) of the Communications Act of 1934. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 23, 1992

Released: December 16, 1992

CERTIFIED MAIL NO. P 295 670 784
RETURN RECEIPT REQUESTED

Mr. J.J. (Jake) Stauffer
111 S. Bridge Street
Washington, N.C. 27889

Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Mr. J.J. (Jake) Stauffer
on December 30, 1991.
3153202-91-079

Dear Mr. Stauffer:

This is in response to your letter dated May 14, 1992, that you sent to the Federal Communications Commission (FCC). It appears that your letter was mailed to the FCC's regional director in Atlanta, Georgia. He forwarded it to the FCC in Washington, D.C. Your letter, in general, objected to a $2,000 monetary forfeiture penalty that had been assessed against you by the FCC's Norfolk Office.

We are treating your letter as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, we are affirming the $2,000 monetary forfeiture penalty.

Our records show that on June 6, 1991, two FCC inspectors posing as potential customers visited your retail store in Washington, North Carolina. In a public display room off of the main display room they observed a Sommerkamp TS2000 DX radio transceiver. The radio was on display on a shelf and was not in a box. The FCC inspectors observed that the radio did not have a label indicating that it had been authorized by the FCC. They also observed that the radio was capable of operating on Citizens Band (CB) and amateur frequencies.

On June 20, 1991, the FCC's Norfolk Office issued you a Notice of Apparent Liability for a monetary forfeiture penalty for willfully violating Section 2.803 of the FCC's rules by marketing the Sommerkamp TS 2000 DX radio. 47 U.S.C. Section 2.803. Your attorney responded on July 3, 1991, and October 15, 1991. On December 30, 1991, the FCC's Norfolk Office issued you a Notice of Forfeiture for a $2,000 monetary forfeiture penalty. You subsequently wrote the FCC's Norfolk Office on January 20 and May 11, 1992.

Section 2.803 of the FCC's rules prohibits the marketing, including the displaying and offering for sale, of radio frequency devices that require, but have not received FCC authorization. A radio capable of operating on CB frequencies must be authorized by the FCC. The type of authorization that is required is type acceptance. 47 C.F.R. Section 95.603(c). Sections 2.901 through 2.1065 of the FCC's rules explain the equipment authorization procedures. 47 C.F.R. Sections 2.901-2.1065. To be FCC authorized, radio equipment must meet technical standards designed to promote the efficient use of the radio spectrum and to minimize the possibility that radios will cause interference to other electrical equipment. 4 C.F.R. Sections 2.901 and 15.105(b). Furthermore, FCC authorized radios must have a label indicating that they have been authorized. 47 C.F.R. Sections 2.925 and 2.926. The FCC's rules, though, also make clear that the FCC will not authorize a CB radio if it is capable of operating on frequencies used by The Amateur Radio Service. 47 C.F.R. Section 95.651(a). The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

In your letters, you state that you should not be subject to a monetary forfeiture penalty because you had ordered a Ranger 2950 radio and thought that the radio you had received was identical to the Ranger radio. The radio, moreover, you explain had been recently received and was still in a box that had not been opened. Furthermore, you claim that the radio was an amateur radio and not a CB radio, and that the manual for the radio only lists amateur frequencies. As previously explained, the two FCC inspectors observed the radio on display on a shelf and not in a box, observed that the radio was capable of transmitting on CB and amateur frequencies, and failed to find a label on the radio indicating that it had been authorized by the FCC.

You also state that you are financially unable to pay the penalty, and that you are bankrupt. Section 503(b)(2) of the Communications Act directs the FCC to take into consideration ability to pay when it imposes forfeiture penalties. However, claims of inability to pay must be supported by documentation and this documentation usually takes the form of Federal Income Tax returns or legal proof of bankruptcy. Therefore, if you wish to claim inability to pay, please provide copies of your federal tax returns for the last three years or legal proof of bankruptcy.

Please submit either this proof of inability to pay or the $2,000 monetary forfeiture penalty within 30 days. Payment of the monetary forfeiture penalty may be by check or money order payable to the Federal Communications Commission. The number 3153202-91-079 should be placed on the check and it should be sent to the following address (please note that this is a new address which changed between the dates of the Notice of Apparent Liability issued to you and the Notice of Forfeiture):

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to submit proof of bankruptcy or tax returns, please send them to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Higher Level Review, Code 1500E3
1919 M Street, N.W., Room 744
Washington, D.C. 20554

Finally, you state that you will not pay "unless a judge and a jury make me." If a forfeiture penalty is not paid by the specified date, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a). In other words, disputes regarding forfeiture penalties usually result in a civil (not criminal) trial in a U.S. District Court. This is a trial de novo in which both sides present their evidence before a judge regarding whether a monetary forfeiture should be imposed. If a judge decides in favor of a monetary forfeiture penalty, this is an enforceable judicial decision.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 30, 1992

Released: December 16, 1992

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

Western States Broadcasting
12550 Brookhurst Street, #A
Garden Grove, California 92640

Attention: Mr. William L. Zawila
President

Re: Notice of Forfeiture
issued to Western
States Broadcasting
(Station KCHQ-FM)
on August 27, 1991.
3153502-91010
PO-910091

Dear Western States Broadcasting:

This is in response to your letter dated June 13, 1992, to the Federal Communications Commission (FCC), Washington, D.C. Your letter requested "reconsideration . . . by the Commission" of a $1,000 monetary forfeiture penalty that the FCC imposed on Western States Broadcasting (Western).

As explained below, we are affirming the $1,000 penalty, but we are holding the requirement that it be paid in abeyance for three years. If during this period, the same violations are not repeated, there will be no obligation to pay the penalty.

On August 27, 1991, the FCC issued Western a Notice of Forfeiture for a $1,000 monetary forfeiture penalty for violating its FCC station authorization and Section 73.1560(d) of the FCC's rules by operating its station KCHQ-FM at reduced power, and by operating a broadcast booster station without FCC authorization. 47 C.F.R. Section 73.1560(d). Western appealed this decision to the FCC on September 25, 1991. The FCC's Field Operations Bureau replied on May 13, 1992, that it was treating Western's appeal as a Petition for Reconsideration under Section 1.106 of the FCC's rules, and affirmed the $1,000 penalty. 47 C.F.R. Section 1.106. Western's June 13, 1992, letter requests "reconsideration ... by the Commission." It is not clear whether Western is now requesting the FCC's Field Operations Bureau to reconsider its reconsideration, or whether Western wishes to file an "Application for Review" to the FCC's five person Commission under Section 1.115 of the FCC's rules. 47 C.F.R. Section 1.115. We are treating Western's request as the former.

Western in its June 13, 1992, letter states several reasons why the monetary forfeiture penalty should not be imposed. Western's main argument is that payment of the $1,000 monetary forfeiture penalty would cause it financial hardship, and it submitted tax returns and operating statements to document its claim.

Section 503(b)(2) of the Communications Act of 1934 directs the FCC to take into consideration ability to pay in assessing monetary forfeiture penalties. 47 U.S.C. Section 503(b)(2). Based on this consideration, the $1,000 monetary forfeiture penalty is held in abeyance for three years from the date of this letter. If during that period, the same violations are not repeated, there will be no obligation to pay the monetary forfeiture penalty. However, if either of the violations should occur again during this period, Western will be obligated to pay the $1,000 monetary forfeiture penalty imposed by this forfeiture proceeding, as well as any additional forfeitures for the new violation.

Western's other arguments are that the booster was subsequently approved by the FCC, the booster operated within the contour of KCHQ-FM's service area, the booster did not cause interference, KCHQ-FM was receiving complaints that the signal from its main transmitter site was deficient, that it "honestly believed in good faith that its action" was proper, and that it has no prior violations.

The operation of the main transmitter at reduced power, and the unlicensed booster station clearly violated the terms of Western's license and the FCC's rules. Although the booster was subsequently licensed by the FCC and did not cause interference, these factors do not cure the violation. Furthermore, a licensee's ignorance of the FCC's rules does not excuse a violation. *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984). Finally, the $1,000 penalty imposed on Western was within the range of the usual penalty assessed by the FCC in early 1991 for a first violation of the rules involved.

By holding the forfeiture penalty in abeyance, the FCC seeks to achieve its enforcement goals while making allowance for Western's current financial condition. When a person accepts a broadcast license from the FCC, that person takes on the responsibility to comply with the FCC's rules. Please exercise care in the future to comply with these rules. The FCC takes very seriously its duty to enforce its rules.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 30, 1992

Released: December 16, 1992

CERTIFIED MAIL NO. P 295 670 782
RETURN RECEIPT REQUESTED

Anacortes Yacht Charters
P.O. Box 69
Anacortes, Washington 98221

Attention: Mr. Dan Meyer

Mail Stop 1500E3

Re: Notice of Forfeiture
issued to Anacortes
Yacht Charters
on June 25, 1992.
215 FE 0105

Dear Anacortes Yacht Charters:

This is in response to your letter to the Federal Communications Commission (FCC), Washington, D.C., dated June 26, 1992. Your letter requested "further review" of a $800 monetary forfeiture penalty that had been issued to Anacortes Yacht Charters, Inc. (Anacortes) by the FCC's Ferndale, Washington Office.

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, we are affirming the $800 monetary forfeiture penalty.

Our records show that on January 8, 1992, at 9:47 a.m. PST, the FCC's Ferndale Office monitored radio transmissions on Marine Channel 68 (156.425 MHz) from a station identified as "Anacortes Yacht Charters WQB 306." FCC records indicated that the call sign WQB306 had been issued to Anacortes, but its license had expired on September 19, 1991. On January 8, the FCC's Ferndale Office phoned Anacortes and spoke to Mr. Dan Meyer. He stated that he was aware that Anacortes's license had expired, and that a license application had been submitted to the FCC on December 26, 1991.

On January 10, 1992, the FCC's Ferndale Office wrote Anacortes warning that the unlicensed operation of a radio station violated Section 301 of the Communications Act of 1934, 47 U.S.C. Section 301 (requires an FCC license to operate a radio transmitter). On June 15, 1992, the FCC's Ferndale Office issued Anacortes a Notice of Apparent Liability for an $8,000 monetary forfeiture penalty. Anacortes replied on June 18, 1992. On June 25, 1992, the FCC's Ferndale Office issued a Forfeiture Order that imposed a reduced monetary forfeiture penalty of $800. The FCC's authority to impose monetary forfeiture penalties for violations of the Communications Act is contained in Section 503(b) of the Communications Act. 47 U.S.C. Section 503(b). Anacortes states several objections to the $800 monetary forfeiture penalty. First, it states that this was "a first offense." The FCC's Ferndale Office, as explained in its Forfeiture Order, took this into consideration when it reduced the penalty from $8,000 to $800, which was a substantial reduction.

Second, Anacortes states that "a fine of $800 seems harsh." The unlicensed operation of a radio transmitter is one of the most serious violations under the Communications Act. *Mebane Home Telephone Company*, 51 RR 2d 926, 927 (Common Carrier Bureau 1982). The monetary forfeiture penalty was within the limits provided in Section 503(b) of the Communications Act and followed the guidance provided in the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR 2d 823 (1991), *modified in part on reconsideration*, FCC 92-212 (May 14, 1992) (hereinafter cited as *Policy Statement*). The *Policy Statement* recommends an $8,000 monetary forfeiture penalty for unlicensed operation, and the FCC's Ferndale Office imposed a penalty considerably less than this. The FCC has explained that it "takes into account many factors when deciding the amount of any forfeiture. These factors include the circumstances and seriousness of the violation, ... and the considerations specified in Section 503(b)(2) of the Communications Act ... . Our policy of imposing substantial forfeitures for first or second violations is well-founded ... . [W]e cannot possibly detect every violation of our ... rules. Therefore, we must encourage consistent compliance by imposing forfeitures when, at various times, we discover violations." *Standard Communications Corporation*, 1 FCC Rcd 358 (1986).

Third, Anacortes indicates that the violation was inadvertent in that Anacortes made prior arrangements with a vessel owner to monitor his radio transmissions, and although "a note was posted on the radio that it should not be used until renewal was received ... " that "it simply did not occur to the staff person that our license had expired ..." and "when he called we ... responded" and "a brief discussion followed." Anacortes is responsible for the acts of its employees. *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984). Furthermore, an inadvertent mistake, such as an inattentive, thoughtless, clerical or technical error does not excuse a violation. *Standard Communications Corporation*, 1 FCC Rcd at 358; *Radio Relay Corp. - Michigan*, 5 FCC Rcd 5900, 5901 (Mobile Services Division 1990). A violation occurs if a person intended to do the act in question, such as transmit on a radio, and it is not necessary to also prove that the person knew he was acting wrongfully or violating the Communications Act. 47 U.S.C. Section 312(f)(1); *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991).

Finally, Anacortes states that when its license expired in September 1991, it did not remember that it received notification from the FCC regarding the need for renewal. The FCC has been automating its records to provide renewal notification to licensees in some radio services, including the maritime services. Anacortes probably received a renewal notice from the FCC before its license expired in September 1991.

However, licensees are held responsible for operating under a valid license regardless of whether the FCC provided renewal notification. The FCC's rules require applications for renewal to be submitted "within 90 days but not later than 30 days prior to the end of the license term."

47 C.F.R. Section 1.926(b). If a licensee receives a renewal notice from the FCC, this notice may be used to apply for renewal. However, if a licensee does not receive a renewal notice, the licensee is still required by the FCC's rules to submit a renewal application. 47 C.F.R. Section 1.926(a)(1) and (2). It is, moreover, clearly stated on licenses when they expire, and the FCC's rules require licenses to "be posted at the principal control point for each station." 47 C.F.R. Section 80.405(c). Thus, even without FCC notification, Anacortes should have been aware of the need to renew its license before it expired.

Subsequent remedial action, moreover, does not nullify a forfeiture penalty. *Station KGVI, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corporation*, 3 FCC 699, 700 (1966).

Please submit the $800 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 215 FE 0105 on the check and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If the forfeiture penalty is not paid by the specified date, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules for Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum Through a Competitive Bidding Process — RM-7985

ORDER

Adopted: December 9, 1992; Released: December 16, 1992

By the Chief, Private Radio Bureau:

1. On April 22, 1992, Fleet Call, Inc. (Fleet Call) filed a Petition for Rule Making (Petition) that asks the Commission to employ competitive bidding to assign large blocks of fallow 800 MHz Specialized Mobile Radio (SMR) spectrum for the exclusive use of licensees operating digital, wide-area SMR systems. We have carefully reviewed the Petition and the record produced in response to our Public Notice of May 11, 1992.[1] While we support many of Fleet Call's objectives,[2] we currently have no explicit authority to hold spectrum auctions. Moreover, we intend to examine wide-area licensing of 800 MHz SMR systems in the context of several related petitions for rule making that are currently pending.[3] We therefore dismiss this Petition.

2. Although the SMR service is rapidly expanding, some frequencies remain vacant in the nation's less populated areas. The Petition before us states that the cost efficiency of wide-area regional and/or national SMR systems is undercut by Commission regulations, such as limits on the number of channels that may be licensed to each operator.[4] Fleet Call suggests that the Commission allocate large blocks of 800 MHz SMR channels (which it calls "innovator blocks") and license the blocks through competitive bidding for the exclusive use of wide-area, digital systems in each area.[5]

3. The commenters generally agree with Fleet Call that our current regulatory structure for 800 MHz SMR service does not readily lend itself to regional or national network licensing. The centerpiece of Fleet Call's solution to the wide-area network problem, however, is the competitive bidding proposal. In contrast, many commenters suggest that we facilitate construction of wide-area systems by amending or eliminating certain existing rules.[6] We agree with these commenters. As Fleet Call concedes,[7] we currently lack explicit authority to award licenses through auctions, and we have seen no indication as to when we might receive such authority. In the interim, the need for a comprehensive approach to wide-area licensing has become more compelling, as evidenced by numerous recent requests for rule waivers by parties proposing wide-area SMR systems.[8] We are expeditiously developing proposals to address this issue within the scope of a rule making.

4. For the foregoing reasons, IT IS ORDERED that the Petition for Rule Making filed by Fleet Call, Inc. IS HEREBY DISMISSED. This order is issued pursuant to the authority set forth in Sections 0.331, 1.401 and 1.407 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.401 and 1.407.

5. For further information concerning this Report and Order, contact Julia F. Kogan, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-7125.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] *See* Petition for Rule Making, In the Matter of Policies and Rules for Licensing Fallow 800 MHz Specialized Mobile Radio Spectrum Through a Competitive Bidding Process, RM-7985, filed April 22, 1992 (Petition); *Public Notice*, Report No. 1889, May 11, 1992. The due date for comments was extended to July 17, and replies were due on August 3, 1992. *See* Order Extending Comment Period, 7 FCC Rcd 4018 (1992); Order Extending Reply Comment Period, PR Docket No. 92-79, 7 FCC Rcd 4284 (1992).

[2] The Petition before us asserts that Fleet Call's plan will expand SMR roaming coverage, serve less populated areas, enhance loading capacity and increase service options. *See* Petition at 5-6; *cf. Memorandum Opinion and Order*, Request of Fleet Call, Inc. For Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533, 1533-34 (1991) (Fleet Call Waiver Order) (waiving one-year construction period so Fleet Call could build then-innovative low-power digital stations, and noting "the general merits of Fleet Call's proposal").

[3] *See, e.g.*, RM-8029 (asking Commission to facilitate licensing of wide-area SMRs), filed March 13, 1992 by National Association of Business and Educational Radio, Inc. (NABER); RM-8030 (asking Commission to modify the "40-mile rule," 47 C.F.R. § 90.627(b)), filed May 26, 1992 by A&B Electronics; RM-8117 (AMTA Wide-Area Licensing Petition) (proposing a wide-area SMR licensing program), filed October 26, 1992 by American Mobile Telecommunications Association, Inc. (AMTA).

[4] *See* Petition at 16; *see also* 47 C.F.R. §§ 90.627(b), 90.631(d).

[5] *Id.* at 18-21.

[6] *See, e.g.*, AMTA comments at 8 (urging us to give efficient systems relief from the "40-mile rule" and loading requirements); NABER comments at 19-20 (suggesting that we alter the 40-mile rule to encourage construction rather than loading); Florida Specialized Mobile Radio Coalition comments at 8-9 (advocating that we eliminate the 40-mile rule and the rule limiting authorizations to five channels at a time).

[7] *See* In Re Fleet Call, Inc. and Smart SMR, Inc., Request for Waiver of Section 90.631(e) of the Commission's Rules, filed October 12, 1992, at 8.

[8] *See, e.g.*, Waiver Request of Dial Page, L.P., filed June 22, 1992; Waiver Request of Dispatch Communications, filed October 6, 1992; Waiver Request of U.S. Digital, Inc., filed October 8, 1992. The need for a comprehensive approach to wide-area licensing is discussed in the AMTA Wide-Area Licensing Petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-295

In the Matter of:

Request by TV 14, Inc., RM-8016
to Amend Section 76.51 of the
Commission's Rules to Include
Rome, Georgia, in the Atlanta,
Georgia, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: December 4, 1992; Released: December 8, 1992

Comment Date: January 6, 1993
Reply Comment Date: January 19, 1993

By the Commission:

1. Before the Commission is a Petition for Rule Making filed by TV 14, Inc. ("TV 14"), licensee of WTLK(TV), Channel 14 (Independent), Rome, Georgia, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Atlanta, Georgia, television market to "Atlanta-Rome, Georgia." Public Notice of the filing of TV 14's petition was given on June 23, 1992. Other than TV 14's comments in support of the requested rulemaking proceeding, no responsive pleadings were received.

BACKGROUND

2. TV 14's instant petition continues its efforts to include WTLK in the Atlanta television market. In a previous decision, *TV 14, Inc.*, 6 FCC Rcd 7234 (1991), the Commission granted TV 14's request to include WTLK in the Atlanta market for purposes of Section 73.658(m) of the Commission's Rules relating to territorial exclusivity. As a result of that action, WTLK is able to assert nonnetwork program exclusivity rights against other television stations in the Atlanta market. TV 14 now contends that it is necessary to formally redesignate the Atlanta market as the Atlanta-Rome market in order that WTLK may be considered a local station in the Atlanta area under the cable compulsory copyright license.

3. Specifically, TV 14 states that despite the Commission's recent determination regarding WTLK's competitive position in the subject market, some Atlanta-area cable systems are "uncomfortable" claiming the station as a local signal (and therefore not subject to distant signal copyright fees) under the compulsory copyright license, 17 U.S.C. § 111. Due to this lingering question as to their liability for copyright fees, Atlanta market cable systems are reportedly unwilling to carry WTLK. TV 14 notes that under the compulsory license, a station is considered a "local signal" for purposes of a cable operator's compensation liability based, in part, on market designations set forth in Section 76.51 of the Commission's Rules. In the case of WTLK, TV 14 maintains that although the Commission has determined that the station is local for purposes of Section 73.658(m) territorial exclusivity, the absence of a formal amendment of Section 76.51 to include Rome in a hyphenated Atlanta market leaves some question for Atlanta-area cable systems as to whether the station is a "local signal" under the compulsory license.[1] TV 14 acknowledges that the Commission is considering whether (and if so, how) to update the Section 76.51 listing of market designations,[2] but contends that immediate action is necessary to facilitate cable carriage of WTLK and thus give that station an opportunity to remain viable in the Atlanta market in which it competes. In that regard, TV 14 notes that when it obtained relief from the territorial exclusivity rule, the Commission specifically concluded that it would be "counterproductive to put this station at risk by awaiting the completion of the pending rulemaking".[3] TV 14 argues that the same logic applies to the instant request, and that relief is justified in light of the Commission's previous recognition of WTLK's competitive position in the Atlanta market.

4. As to formal redesignation of the market, TV 14 maintains that its previous request for relief from the territorial exclusivity rule demonstrates that it meets the criteria for hyphenation of the Atlanta market. Specifically, it asserts that WTLK places a city grade signal over Atlanta and that the station's Grade B signal contour substantially overlaps those of all Atlanta stations; that ratings services and local media (as well as the Commission) already consider WTLK to be a part of the Atlanta market; and that syndicators charge the station "full Atlanta rates" for programming.

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[1] TV 14 states that it filed a request with the United States Copyright Office seeking a declaratory ruling that, given the FCC's determination that WTLK was local in Atlanta for programming purposes, it should also be considered local for purposes of compulsory copyright compensation. TV 14 reports, however, that the Copyright Office determined that the Commission's action with respect to Section 73.658(m) territorial exclusivity had no effect on the statutorily mandated mechanics of the compulsory licensing scheme, which is based on the market designations contained in Section 76.51 of the Commission's Rules. Accordingly, the Copyright Office declined to act on TV 14's request.

[2] *Further Notice of Proposed Rulemaking* in Gen. Docket No. 87-24, 3 FCC Rcd. 6171 (1988). That rulemaking generally concerns a review of the scope of the territorial and cable television exclusivity rules and the market designations used for purposes of those rules, and related issues involving market designations and the compulsory copyright license. *See* 3 FCC Rcd at 6176, n.15. We note that the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (Cable Act of 1992), requires the Commission to make necessary revisions to Section 76.51 of the Commission's Rules, the list of television markets, in connection with a rulemaking proceeding on must-carry. That proceeding is going forward on a separate track.

[3] *TV 14, Inc.*, 6 FCC Rcd at 7235.

DISCUSSION

5. The top 100 television markets, including hyphenated markets, are those specified in Section 76.51 of the Commission's Rules.[4] This market list is not only used to determine territorial exclusivity rights under Section 73.658(m), but also helps define the scope of compulsory copyright license liability for cable operators. *See* 17 U.S.C. §111(f). The "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Redesignation of the market as requested in this case will permit Atlanta-area cable systems to carry WTLK on an equal basis with other television stations in the market without incurring "distant signal" copyright liability. It would also extend the area in which Atlanta stations are considered local signals under the market definition provisions of the Commission's Rules, and thus redefine the area in which Atlanta stations may assert syndicated exclusivity and network nonduplication rights.

6. The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market including competing stations licensed to different cities within that market area. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972). Market hyphenation "helps equalize competition" where, due to population, geographic, or other factors, some stations licensed to different communities beyond the Grade B contours of those stations in a given television market compete for economic support. *Id.* In evaluating past requests for hyphenation of a market, the Commission has considered among the following factors as relevant to its examination: (1) the distance between the proposed community and the existing designated communities; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. *See, e.g., Major Television Markets (Fresno-Visalia, Calif.)*, 57 RR 2d 1122 (1985). Each of these factors assists the Commission to evaluate individual market conditions consistently with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete.

7. Based on the facts presented, we believe that a sufficient case for market hyphenation has been set forth so that this proposal should be tested through the rulemaking process and comment requested from interested parties. Accordingly, we seek comment on amending the list of television markets set forth in Section 76.51 by hyphenating the Atlanta market to include Rome as requested by TV 14. It appears from the information before us that WTLK and the stations in the Atlanta market have coverage areas that substantially overlap and that these stations do, in fact, compete for audiences with each other throughout much of the proposed combined market area. Arbitron already lists Rome within the Atlanta "area of dominant influence." Moreover, TV 14 references and reasserts its previous showing that program syndicators and market-area program listings consider WTLK local in the market, and claims such facts further underscore that WTLK and the other Atlanta market stations are economically interdependent and competitive. Although Rome and Atlanta are some 56 miles distant and the facilities of the Rome and Atlanta stations are not collocated, the Commission has previously concluded, in a slightly different context, that the actual location of the transmitters of the stations involved render the stations unavoidably competitive.[5]

8. Accordingly, based on our stated policy considerations, we tentatively conclude that Section 76.51 of the Commission's Rules should be amended by adding Rome to the Atlanta market designation, and we seek comment on this tentative conclusion.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 6, 1993, and reply comments on or before January 19, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. A few number of television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the cer-

[4] The Atlanta market is currently ranked eighteenth in Section 76.51. For markets not listed in Section 76.51, the Commission refers to the most recent ARB *Television Market Analysis*.

[5] 6 FCC Rcd at 7235.

tification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 9, 1992

Report No. DS-1264

DIGITAL AUDIO RADIO SERVICE
SATELLITE SYSTEMS APPLICATIONS
LAUNCH FEE REQUIRED

On October 13, 1992 the Commission released a Public Notice, DA 92-1408, requesting comment on the application filed by Satellite CD Radio (CD Radio). It also announced a cut-off for applications to be considered concurrently with CD Radio's and stated that concrete and comprehensive proposals must be filed by December 15, 1992 together with the appropriate fees. Commission staff have received numerous inquiries about fee issues and there appears to be confusion among potential applicants regarding what fee should accompany their proposals.

Parties wishing to file applications for U.S. domestic digital audio radio service satellite systems to operate in the downlink frequency band of 2310-2360 MHz to be considered concurrently with CD Radio's may do so on or before **December 15, 1992**. Consistent with our policies for domestic fixed-satellite applications, these applications must request authority to construct, launch and operate a system. An applicant seeking construction authority only will not be afforded concurrent consideration with the CD Radio proposal. Together with its detailed proposal, applicants must file, at a minimum, a construction application fee of $2030 for each space station included in its proposal. Applicants may also choose to file the fee for launch and operating authority, which is $70,000 per satellite, at this time. Because there has been some confusion about the appropriate fee to pay, applicants will be permitted to submit the launch and operating authority fee for their system proposals on or before **January 15, 1993**. Failure to file all fees by January 15, 1993 will result in the dismissal of the application.

For further information, contact Rosalee Chiara at 202-634-1781.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-504

In re Applications of

PLAYA DEL SOL BROADCASTERS — File No. BPH-890501MJ

MICHAEL DURDEN — File No. BPH-890503MP

For Construction Permit for a
New FM Station on Channel 249A
in Mecca, California

Appearances

Richard S. Rodin, Esquire, David W. Karp, Esquire, Marissa G. Repp, Esquire, and *Dennis J. Kelly, Esquire,* on behalf of Playa Del Sol Broadcasters; *Eric S. Kravetz, Esquire,* on behalf of Michael Durden; and *James W. Shook, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: December 10, 1992; Released: December 17, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order,* 5 FCC Rcd 7606 (1990) ("*HDO*"), the Assistant Chief, Audio Services Division, designated for consolidated hearing the mutually exclusive applications of Playa Del Sol Broadcasters ("Playa"), and Michael Durden ("Durden") for a construction permit for a new FM station on Channel 249A in Mecca, California.[1] The hearing issues specified in the *HDO,* as they pertain to Playa and Durden were as follows:[2]

2. To determine which of the proposals would on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. By *Memorandum Opinion and Order,* FCC 92M-503, released May 4, 1992, the following issue was added to this proceeding:[3]

10. To determine whether Michael Durden falsely certified reasonable assurance of finances in the application of Spirit Broadcasting for a construction permit for a new FM station at Montecito, California, and, if so, the effect thereof on his qualifications to become a Commission licensee.

The burden of proceeding on this issue was assigned to Playa and the burden of proof was assigned to Durden.

3. Prehearing conferences in this proceeding were held on February 22, 1991, September 4, 1991, January 28, 1992, and May 28, 1992. Hearings were held in Washington, D.C., on May 21, 1991, June 3, 4 and 5, 1991, March 24 and 25, 1992, and July 14, 1992. The record was closed on July 14, 1992. (Tr. 988; *Order,* FCC 92M-789, released July 16, 1992.)

4. Proposed findings of fact and conclusions of law were filed by each applicant on September 15, 1992.[4]

FINDINGS OF FACT

Standard Comparative Issue

Playa Del Sol Broadcasters

5. *Structure and Integration.* Playa is a sole proprietorship, owned by Edward R. Stolz, II. (Playa Ex. 1.) Stolz does not plan to manage the operation of the proposed station, but will hire a station manager who will report to him. Playa, therefore, does not seek integration credit. (Playa Ex. 2.)

6. *Diversification.* Stolz is sole proprietor of Royce International Broadcasting Company, licensee of station KWOD-FM, Sacramento, California, and permittee of station KRCK(AM), Burbank, California. Stolz has also entered into an agreement in principle with the trustee in bankruptcy for the purchase of station KKSA(FM), Folsom, California. Stolz has no other cognizable interest in

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[1] Also designated for hearing were the applications of Country Club Communications, Inc. ("Country Club"), Christian Service Network, Inc. ("CSN"), Anbilog Communications, Inc. ("Anbilog"), and Valdovino Broadcasting, Limited Partnership ("VBLP"). The applications of Country Club, CSN, and Anbilog were dismissed with prejudice by *Order,* FCC 91M-748, released February 26, 1991, *Memorandum Opinion and Order,* FCC 91M-944, released March 14, 1991, and *Order,* FCC 91M-1821, released June 7, 1991, respectively. Due to the death of VBLP's sole general partner, the application of Frank J. Valdovino, Jr. ("Valdovino"), was substituted for that of VBLP. *Order,* FCC 92M-246, released February 26, 1992. By *Memorandum Opinion and Order,* FCC 92M-867, released August 12, 1992 (corrected by *Erratum,* Mimeo No. 03857, released August 14, 1992), a post-hearing Motion for Summary Decision was granted, two financial qualifications issues specified against VBLP were resolved adversely to Valdovino, Valdovino was found to be not basically qualified to become a Commission licensee, and the Valdovino application was dismissed. No appeal of that action was filed.

[2] Issue 1 was an air hazard issue specified against Country Club and CSN. As discussed in note 1, *supra,* those applications have been dismissed.

[3] Issues 4 through 9 were added against VBLP by *Memorandum Opinion and Order,* FCC 91M-2042, released July 2, 1991. As discussed in note 1, *supra,* the application of Valdovino, the successor to VBLP, was dismissed.

[4] Playa filed errata to its proposed findings and conclusions on September 18, 1992. s Reply findings were filed on September 29, 1992.

any radio or television station, cable television system, newspaper, motion picture theatre, magazine or publishing company, or any other media of mass communications. (Playa Ex. 1.)

7. *Auxiliary Power.* Playa will purchase and install an auxiliary power generator for its new studio. Playa will also install an auxiliary power generator at its transmitter site. (Playa Ex. 4.)

Michael Durden

8. *Structure and Integration.* Durden is an individual applicant. If his application is granted, Durden will have 100 percent ownership and control of the station. Durden will be employed at the station as its General Manager on a full-time basis, at least 40 hours a week. As General Manager, Durden will supervise the day-to-day operation of the station, including its sales, programming, promotional, and internal administrative activities. Durden will also be the one to make decisions concerning the hiring, firing, or promotion of station personnel. In order to meet his integration commitment, Durden will terminate his current employment and limit all other conflicting activities. (Durden Ex. 1, pp. 1-3.) Durden will also move to Mecca or the surrounding area. (Tr. 150.)[5] Durden is an African-American male. (Durden Ex. 1, p. 3.)

9. *Diversification.* Durden has no existing interest in any medium of mass communications. (Durden Ex. 1, p. 3.)

10. *Auxiliary Power.* If his application is granted, Durden will install auxiliary generating equipment so that the station will be able to continue operations in the event of a power outage. (Durden Ex. 1, p. 3.)

Comparative Coverage

11. Playa and Durden have stipulated that a review of their respective technical proposals and the coverage maps of existing stations on file at the Commission indicates that all significant areas or populations to be served by the applicants presently receive full-time aural service from at least five existing stations. The applicants have also stipulated that neither would be entitled to a preference under the standard comparative issue for the areas or populations which they propose to serve. (Joint Ex. 1.)

Basic Qualifications Issue

Issue 10 -- False Certification Issue Against Durden

12. The application of Spirit Broadcasting, a California Limited Partnership ("Spirit"), for a construction permit for a new FM broadcast station on Channel 225A at Montecito, California, was filed with the Commission on January 2, 1986. (Playa Ex. 6, p. 2.) Michael Durden was the General Partner of Spirit; Martin Moss and Jimmy Turner were the Limited Partners of Spirit. (*Id.* at 3.) Durden signed the Spirit application on December 30, 1985. (*Id.* at 5; Tr. 908-9.)

13. The Spirit application was initiated by Michael Durden, who had become interested in broadcasting after retiring from professional football in 1985. Such interest was generated by Durden's own salaried internship at stations KGIL and KGIL-FM, San Fernando, California, and by his conversations with Cliff Gill, a friend and business partner of Durden's father. Gill was a broadcaster who had built and operated radio stations in southern California for many years. During their conversations, Gill told Durden that the Commission had recently assigned new FM channels to a number of communities in southern California and that this presented a unique opportunity for Durden to obtain his own broadcast station. Gill also offered to help Durden prepare an application if Durden decided to apply for one of these frequencies. (Durden Ex. 1, p. 1, and Ex. 9, pp. 1-2; Tr. 173-74, 980-81.)

14. After his conversations with Gill, Durden discussed the subject with his father, Earnel Durden, who agreed to help finance the station if his son obtained a permit.[6] Earnel indicated that getting the permit would be Durden's responsibility. Durden therefore contacted a few close friends who had been his teammates on their college football team. Two of these friends, Martin Moss and Jimmy Turner, agreed to contribute $25,000 each to the project in return for ownership interests. It was understood that Durden would be personally running the station while his partners continued their professional football careers. (Durden Ex. 9, p. 2.)

15. In June or July 1985, Durden, Moss, and Turner each contributed $2,500 to cover the initial legal and engineering expenses they expected to incur. No partnership agreement was signed at this time and Durden did not issue receipts for these contributions. This was the first business deal Durden had ever managed, and he approached it informally, relying on the partners' eight-year friendship. (Durden Ex. 9, pp. 2, 8.)

16. During the fall of 1985, Durden learned all that he could about broadcasting while working at stations KGIL and KGIL-FM. Durden was particularly interested in the business end of station operations, and had a series of conversations at different times with different management personnel and the station bookkeeper about the costs of operating a radio station. Durden also spoke with Earnel about the costs of building and running a station, because Earnel had filed his own application for an FM radio station and was a participant with other investors, including Gill, in another application for an AM station. (Durden Ex. 9, pp. 2-3.)

17. After discussing the options with Gill, Durden decided that he would apply for the FM channel which had been allotted to Montecito, California. Gill then referred Durden to an engineer, helped Durden select an antenna site, and worked with Durden to develop an overall estimate of what it would cost to build and operate a station in that market. Durden and Gill went over the costs of the basic equipment which would be needed, estimated what it would cost to rent tower space and studio space, and what other operating costs, including staff salaries, would have to be met if Durden and his partners actually received a permit. The total cost estimate which Durden reached with Gill's assistance was $150,000. This figure was in line with the information Durden had previously obtained. Durden and Gill also estimated that the legal and

[5] Durden is not entitled to any enhancement credit for his proposed future service area residence. (Tr. 104-9, 150.)

[6] For purposes of clarity, the applicant will be identified as "Durden" and his father will be identified as "Earnel."

engineering fees for obtaining the permit would be $30,000, a figure which also generally conformed to the information Durden had received earlier. (Durden Ex. 9, p. 3; Tr. 933, 935, 960-62.) Durden took notes of most of these conversations. However, he saw no need to keep these notes or to write down an itemized budget, and it was never suggested to him that he do so. (Durden Ex. 9, pp. 3, 10; Playa Ex. 8, pp. 69-70.)

18. The equipment estimates relied on by Durden were for used equipment. (Tr. 960.) Gill went through a list of equipment which would be needed for the station and told Durden it could be purchased used. (Tr. 980.) Durden stated that at one time he had estimated the costs for a transmitter, transmitting antenna, transmission line, frequency and modulation monitoring equipment, studio transmitter link system, studio equipment, and monthly operating expenses, but he could not remember the specific dollar figures for each such cost component at the July 1992 hearing. (Tr. 939-41, 945, 948.) Durden could not remember making an estimate of the cost of obtaining auxiliary power generators (Playa Ex. 8, pp. 6-7), nor did he make any inquiries of commercial real estate people in the Montecito/Santa Barbara area as to what Spirit might be expected to pay for studio space (Tr. 948).

19. As noted above, Durden's estimates were for used equipment. Durden could not remember the name of the company from which the used equipment would be procured. (Tr. 960.) Nor could he recall whether Gill mentioned the name of a specific vendor from whom he could purchase a used transmitter that fit the specifications of Spirit's Montecito technical proposal. (Tr. 978-79.) Durden took Gill's word that used equipment would be available, and made no attempt to independently check this information. (Tr. 979-80.) According to Durden, Gill, although not an "official engineer," had built a number of stations in the southern California area. (Tr. 980-81.)

20. Durden sent handwritten notes to Moss and Turner listing the overall expenses which his proposed project was expected to incur, and they agreed to proceed with the application. Specifically, the three men agreed to divide the cost of the application equally, so that each would invest $10,000. Once a construction permit had been obtained, Moss and Turner would pay the remaining $15,000 they had promised to contribute, while Durden would be responsible for obtaining the rest of the funds ($120,000) which would be required. Durden spoke to Earnel, who confirmed that he (Earnel) would lend Durden the additional $120,000. (Durden Ex. 9, pp. 3-4.)

21. At this point, Durden believed that the money he was depending upon would in fact be available to him. He knew that he had the money which he agreed to invest in the project and had no doubt that Moss and Turner also had the funds they promised to invest. They not only were close long-time friends whom he trusted, he saw no reason for them to join him and promise to invest if they did not have the funds. Durden also knew that they were professional football players who had received signing bonuses, and they apparently had no major financial obligations which would interfere with their commitments to Spirit. (Durden Ex. 9, pp. 4, 10.) Durden's general understanding of Moss's and Turner's financial positions was also based upon his knowledge of their respective lifestyles. (Tr. 981.) In view of all of this Durden did not ask Moss and Turner to prove to him that they had the money which they said they had, and it never occurred to him to ask. (Durden Ex. 9, p. 4.) Thus, prior to the time he certified Spirit's financial qualifications, Durden never obtained or saw any written documentation that either Moss or Turner had the financial wherewithal to meet their commitments to Spirit (Playa Ex. 8, pp. 31-32), Durden had not seen a balance sheet or other written financial information from Moss or Turner (Tr. 924-25), and Durden had no personal knowledge of the salaries of Moss or Turner (Tr. 930).

22. For his part, Durden orally assured Moss and Turner that he had the $120,000 to meet his own obligation to Spirit. He did not exchange any documents with Moss and Turner to demonstrate his own financial wherewithal. (Playa Ex. 8, p. 31.) However, Durden did not possess $120,000 in net liquid assets at the time he certified Spirit's financial qualifications. (Tr. 922.) In this regard, in late 1985 Durden was working at station KGIL, San Fernando, California, and earning a salary of less than $20,000 a year. (Tr. 930.) Instead, as noted above, it was Durden's plan to obtain a $120,000 loan from Earnel to meet his obligation to Spirit. (Tr. 922.)

23. Durden believed that the loan promised by his father would be available after the grant of his application. Earnel's promise seemed realistic to Durden based on what Durden knew or believed about Earnel's financial position. Earnel was employed as a coach for the San Diego Chargers professional football team with, Durden believed, a salary in excess of $100,000 per year. Durden also believed that Earnel had real estate investments, and apparently had no significant financial obligations which would keep him from fulfilling his promise. (Durden Ex. 9, pp. 4-5; Tr. 955-59.) In addition, it never occurred to Durden that his father would agree to make such a loan if he did not mean to do so or could not do so. Earnel had also made commitments to other FCC applications in which he (Earnel) was involved, and told Durden that these would not prevent him from lending Durden money for his Montecito station. Durden did not ask his father to prove to him that he (Earnel) would have the money available, and it never occurred to Durden to ask for such proof. (Durden Ex. 9, pp. 4-5; Tr. 922, 925-30.) Thus, prior to the time he certified Spirit's financial qualifications, Durden had not seen a balance sheet or written financial information for Earnel. (Tr. 924-25.) Nor did Durden have personal knowledge of exactly what Earnel made in salary, what his investments were, or the extent of his liabilities. (Tr. 957.)

24. Durden and his father did not discuss the terms of the proposed loan. (Durden Ex. 9, p. 5.) Specifically, as of December 30, 1985, the date of the Spirit financial certification, there was no written loan agreement, there was no oral agreement specifying an interest rate, there was no oral agreement on a precise repayment term, and there was no agreement as to what, if any, collateral or guarantees would be required for the loan. (Tr. 922-23.) However, Durden understood that whatever the terms of his father's loan ultimately might be, Earnel would not impose a burden which would interfere with his son's ability to construct and operate the station or to repay the loan. (Durden Ex. 9, p. 5; Tr. 922-23.)

25. After he believed he had lined up financing, Durden retained a local lawyer to draw up a formal partnership agreement for Spirit. (Durden Ex. 9, p. 5.) The partnership agreement specified that each partner would invest equally ($10,000 per partner) to obtain the permit and, after they received the permit, each would contribute the remainder of the $25,000 they had promised, and Durden would contribute the money borrowed from his father. With regard to the pre-grant contributions, the agreement recog-

nized that each partner had already contributed $2,500 and specified that each would contribute the remaining $7,500 when the agreement was signed. Durden, however, told Moss and Turner that there was no need to pay the money at that time and that he would ask them for the funds when they were needed. (*Id.* at 7.)[7] Durden, Moss, and Turner signed the partnership agreement. (*Id.* at pp. 6, 7.) It did not occur to Durden that Moss or Turner would sign the agreement if they did not intend to invest the funds or could not afford to do so. (*Id.* at 6.)

26. Durden worked with Cliff Gill to prepare the FCC Form 301 application. (Durden Ex. 9, pp. 5, 6.) Durden and Gill went through the form question by question. (Tr. 949-50.) In this connection, Gill had given Durden copies of forms to be completed by Durden and his partners concerning their qualifications to own a broadcast station. (Durden Ex. 9, p. 5; Tr. 950-51.) The forms, which paralleled the FCC Form 301, were entitled "Broadcast Station Applicant's FCC Information," and stated that the information sought was required for completion of the Form 301. (Durden Ex. 9, pp. 13, 17, 21.) Questions 15 and 16 of Gill's form read as follows (*id.* at 16, 20, 24):

(15) Do you certify that you have sufficient net liquid assets on hand or available from committed sources to provide your share of funds needed to construct and operate the requested facilities for three months without revenue.

_____ Yes _____ No

(16) (a) Do you certify that you have reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock, each loan by banks, financial institutions or others, and each purchase of equipment on credit;

(b) You can and will meet all contractual requirements as to collateral, guarantees, and capital investments;

(c) You have determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

_____ Yes _____ No

Durden, Moss, and Turner completed separate forms, each answering Questions 15 and 16 in the affirmative. (*Id.*)

27. At the end of December 1985, after drafting the FCC application with Gill's assistance, Durden retained Eric Kravetz, a Washington, D.C., communications attorney, to review the application. When Kravetz advised him that the application included all of the information which was called for, Durden signed a finalized copy of the form and sent it to Kravetz for filing at the Commission. (Durden Ex. 9, p. 6.) As noted above, the Spirit application was signed by Durden on December 30, 1985, and filed with the Commission on January 2, 1986. (Playa Ex. 6, pp. 2, 5.)

28. Section III of the Spirit application contained the following questions (Playa Ex. 6, p. 4, italics omitted):

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that:
>
> > (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit;
> >
> > (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment;
> >
> > (c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

Having estimated his station's construction and initial operating costs, having been assured by Moss, Turner, and his father that they possessed and would provide the funds which he had estimated that Spirit would need, and based on his own close relationship with and personal knowledge of those individuals, including his understanding of their general financial circumstances, Durden was satisfied that he had determined that the funds which Spirit would need would in fact be made available to the applicant. In this regard, Durden claimed that no one ever told him that he needed documents from Moss, Turner, and his father which would prove they had the promised funds, nor did the FCC Form 301, on its face, indicate that Durden had to examine the financial statements of these individuals. Based on all the above, Durden answered Questions 1 and 2 of Section III of FCC Form 301 in the affirmative. (Durden Ex. 9, pp. 3-5, 9-10; Playa Ex. 5, p. 4; Tr. 921.)

29. The "Instructions for FCC 301" relative to the version of the form completed by Durden contained the following language, *inter alia*, under the heading "Section III Instructions" (Playa Ex. 9, p. 3):

> C. Documentation supporting the attestation of financial qualifications need not be submitted with this application but must be available to the Commission

[7] Ultimately, Moss and Turner each contributed a total of $10,440 to Spirit during the course of the prosecution of that application. (Durden Ex. 9, p. 7; Tr. 985-86.) After the payment of those sums, Durden asked Moss and Turner to contribute an additional $1,000 each because he had to attend further hearings in Washington, D.C. Moss and Turner refused to make this additional payment because it was more than they originally agreed to contribute to the pre-grant expenses of Spirit, as specified in the partnership agreement, and they were unwilling to commit themselves to meeting any additional pre-grant costs. (Durden Ex. 9, p. 8.)

> upon request. The Commission encourages that all financial statements used in the preparation of this application be prepared in accordance with generally accepted accounting principles.

Durden did not specifically recall having seen these Instructions prior to the filing of the Spirit application. (Tr. 913-14, 918.)[8]

CONCLUSIONS OF LAW

Basic Qualifications Issue

30. Two applicants remain in this proceeding, Playa and Durden. A basic qualifications issue was added against Durden. Since only basically qualified applicants are entitled to comparative consideration, *Louis Adelman*, 29 FCC 1223 (1960), *aff'd. sub nom. Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961), this issue will be resolved before addressing the standard comparative issue.

False Certification Issue Against Durden

31. This issue is resolved in favor of Durden. In order to support the disqualification of an applicant on the basis of a false financial certification, which is, in essence, a misrepresentation to the Commission, an intent to deceive must be demonstrated. "Indeed, substantial evidence of an intent to deceive is the *sine qua non* of any ... misrepresentation issue." *Armando Garcia*, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988) (citation omitted). Here, it is concluded that Durden did not intend to mislead or deceive the Commission by affirmatively certifying Spirit's financial qualifications.

32. The findings establish, and it is concluded, that Durden made serious efforts and proceeded in good faith to ascertain construction and operation costs and to arrange for the availability of funds with which to finance those costs. Thus, Durden attempted to estimate the costs of acquiring the Montecito construction permit and of constructing and operating an FM broadcast station. He did so by attempting to ascertain such costs from what appeared to him to be reasonable and reliable sources, namely, management personnel and the station bookkeeper at stations KGIL and KGIL-FM, an experienced broadcaster who had previously built and operated radio stations in the southern California area, a consulting engineer, and his father, Earnel, who had himself applied for two broadcast facilities.

33. Recognizing that he could not finance the Montecito venture himself, Durden also undertook serious efforts to acquire financial backing from persons whom he knew well and trusted, and who assured him that they would provide such backing up to certain specified amounts. Durden believed that each of these persons could and would make such sums available when necessary because of his long and close relationship with them, his belief and understanding as to their general financial circumstances, and his assumption that they would not have promised him their money if they could not have actually met their commitments. Moss and Turner also provided Durden with written confirmation by supplying him with a pre-filing financial certification comparable to the one Durden would be submitting to the Commission, and by executing the partnership agreement. Further, Durden did not rely on a vague promise that whatever sums Spirit might need would later be made available, nor did he rely on the promises of individuals with whom he had no prior relationship or familiarity.

34. Playa argues that Durden must be disqualified because he did not follow the Commission's stringent requirements for establishing Spirit's financial qualifications, and that his financial certification was, therefore, "patently false." Thus, Playa asserts that Durden made no reasonable attempt to ascertain costs, did not determine whether Moss, Turner, and Earnel had the funds which they committed to Spirit, and had no agreement as to the terms of the loan from Earnel. However, the matter at issue in this proceeding is not whether Durden's financial certification was incorrect as a matter of law, or whether Durden's reliance on the assurances of Moss, Turner, and Earnel was insufficient as a matter of law to provide Durden with "reasonable assurance." The sole question under Issue 10 is whether Durden affirmatively certified Spirit's financial qualifications knowing that such certification was false, with the intent to mislead or deceive the Commission. The evidence of record simply will not support a conclusion that there was intentional deception on the part of Durden.[9] In this regard, Playa relies heavily on its contention that Durden read and was familiar with the "Instructions for FCC 301" and, specifically, with Item C of the "Section III Instructions." However, the weight of the evidence of record does not support a conclusion that Durden read or was familiar with those instructions prior to his certification. *See* para. 29, *supra*.

35. In sum, although Durden may not have estimated costs or obtained reasonable assurance of financing strictly in accordance with the Commission's requirements, the record establishes that he at all times acted in good faith to satisfy what he believed those requirements to be. In doing so, and in certifying Spirit's financial qualifications, it cannot be concluded that Durden intended to mislead or deceive the Commission. Consequently, Issue 10 must be resolved in Durden's favor and it must be concluded that Durden possesses the basic qualifications to become a Commission licensee.

Standard Comparative Issue

36. Durden has been found to be basically qualified to become a Commission licensee. Therefore, the applications of both Playa and Durden must be evaluated under the comparative issue, which is governed by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). In the policy statement, the Commission established two primary objectives toward which the process of comparison should be directed: (a) maximum diffusion of control of the media of mass communications (the diversification criterion); and (b) the best practicable service to the public (the integration criterion). *Policy Statement*, at 394. In addition, the acquisition and proposed use

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[8] *See*, generally, Tr. 910-19, for a discussion of this matter.

[9] This distinguishes the cases cited by Playa from the instant case. In both *Welch Communications, Inc.*, 7 FCC Rcd 4542 (Rev. Bd. 1992), and *Pontchartrain Broadcasting Company, Inc.*, 7 FCC Rcd 1898 (Rev. Bd. 1992), intentional deception was found.

of auxiliary power equipment is also a factor of decisional significance in comparative AM and FM proceedings. *Addendum to Policy Statement of July 28, 1965, on Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966).

37. *Auxiliary Power.* Since each applicant proposes to install auxiliary power equipment, none is to be preferred on this basis.

38. *Diversification.* Edward R. Stolz, II, Playa's sole principal, is also the sole proprietor of the licensee of station KWOD-FM, Sacramento, California, and the permittee of station KRCK(AM), Burbank, California. Michael Durden, an individual applicant, has no existing interest in any medium of mass communications. Thus, Playa must be assessed a demerit for Stolz's ownership of these two California broadcast facilities. *Policy Statement*, at 394-95.

39. *Integration.* Playa seeks no integration credit. Durden, on the other hand, is entitled to 100 percent credit for his management participation proposal.[10] As an individual applicant, Durden will work full-time, at least 40 hours per week, at his station as General Manager. In that capacity Durden will supervise the day-to-day operation of the station. Thus, Durden is to be preferred under the integration criterion. *Policy Statement*, at 395.

ULTIMATE CONCLUSION

40. Durden is the preferred applicant under the integration criterion. In addition, Playa must be assessed a diversification demerit. Consequently, the Durden application is superior to that of Playa under the comparative issue,[11] and a grant of the Durden application will best serve the public interest, convenience and necessity. *F.E.M. Ray, Inc.*, 6 FCC Rcd 4238 (Rev. Bd. 1991), *review denied* 7 FCC Rcd 848 (1992).

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Michael Durden (File No. BPH-890503MP) for a construction permit for a new FM station on Channel 249A in Mecca, California, IS GRANTED, and the application of Playa Del Sol Broadcasters (File No. BPH-890501MJ) IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

[10] Contrary to Playa's assertion, Durden has shown that his integration proposal is capable of effectuation. *See* para. 8, *supra*.

[11] Even if Durden were given no credit for his integration proposal, he would still prevail in this proceeding based upon Playa's diversification demerit.

[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-201

In re Application of

SCOTT M. TRENTADUE File No. BPH-900604MA

For Construction Permit for a
New FM Station on Channel 293A
at Whitewater, Wisconsin

ORDER

Adopted: December 10, 1992; Released: December 18, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. Before the Review Board are a "Motion for Deferment of Action on Settlement Agreement" filed by Scott M. Trentadue on November 16, 1992, and a "Third Supplement to Joint Request for Approval of Settlement Agreement" filed by Frederick W. Kinlow d/b/a F.W.K. Broadcasting Company (FWK), a former party to this proceeding, on November 24, 1992. These pleadings somewhat belatedly concern a settlement agreement between Trentadue and FWK which was approved by the Board in a *Memorandum Opinion and Order*, FCC 92R-87, released November 27, 1992.[1] By that settlement agreement, FWK agreed to the dismissal of its application and related pleadings before the Board and Commission in return for payment of $20,000 by Trentadue in partial reimbursement of FWK's legitimate and prudent expenses.

2. In its Motion, Trentadue requests the Board to defer action on the settlement agreement pending the submission of further documentation by FWK to demonstrate the legitimacy of its claimed expenses. Specifically, Trentadue desires an affidavit from FWK's engineer stating that his charges were "usual and customary" and a copy of the cancelled check showing payment of the FCC filing fee (thus verifying that the fee was not included in another charge). *Trentadue Motion* at 1. FWK's Third Supplement, filed fifty-four days after the original settlement agreement, includes the engineer's declaration and a statement regarding payment of the filing fee.

3. Trentadue's motion presents no basis for reconsideration of our grant of the settlement agreement. Trentadue requests documentation of FWK's expenses beyond that which is required by Section 73.3525 of the Commission's Rules, 47 CFR 73.3525, to show that consideration is limited to the dismissing applicant's legitimate and prudent expenses. The Board was satisfied by FWK's earlier submissions that an adequate showing had been made in this regard.

4. ACCORDINGLY, IT IS ORDERED THAT, The Motion for Deferment of Action on Settlement Agreement, filed November 16, 1992, by Scott M. Trentadue, IS DENIED; and that the Third Supplement to Joint Request for Approval of Settlement Agreement filed by Frederick W. Kinlow d/b/a F.W.K. Broadcasting Company on November 24, 1992, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] The Board adopted its Order on November 17, 1992, one day before receiving Trentadue's instant motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEL-SAVE, INC.,
Complainant,

v. File No. E-92-102

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: December 10, 1992; Released: December 17, 1992

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On August 14, 1992, Tel-Save, Inc. (Tel-Save) filed the above-captioned formal complaint against American Telephone and Telegraph Company (AT&T). In the complaint, Tel-Save alleged, among other things, that AT&T violated Sections 201, 202 and 203, of the Communications Act, 47 U.S.C. §§ 201-203, by denying Tel-Save's requests for Tariff 12 services. AT&T filed its answer on September 16, 1992 in which it denied the allegations of the complaint. The parties thereafter entered into negotiations aimed at settling the matters in controversy. By joint motion filed December 9, 1992, the parties advised the Federal Communications Commission (Commission) that they had reached a mutually satisfactory settlement, with defendant admitting no liability, and requested that the complaint be dismissed with prejudice.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C.§ 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaint with prejudice IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket Nos.
92-261, 92-262,
92-263, 92-264,
92-265, 92-266

In the Matter of

Partial Waiver of the
Sunshine Period Prohibition
In Connection with Various
Cable Television Rulemaking
Items

ORDER

Adopted: December 11, 1992; Released: December 11, 1992

By the Commission:

1. On December 10, 1992, the Commission adopted Notices of Proposed Rule Making in the above-captioned proceedings involving implementation of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act). On December 14, 1992, Commission personnel are scheduled to participate in a forum regarding implementation of the 1992 Cable Act sponsored by, among others, the Federal Communications Bar Association. Because the Commission believes participation in this forum by Commission personnel will serve the public interest, we are, on our own motion, waiving the Sunshine Period prohibition contained in our *ex parte* rules, 47 C.F.R. § 1.1203, for the limited purpose of permitting participation in the forum by Commission personnel. Any presentations made to Commission decision-makers at the forum in connection with these or other pending proceedings that go beyond written comments or filings must, of course, be disclosed pursuant to the *ex parte* rules. *See* 47 C.F.R. § 1.1206.

2. Accordingly, IT IS ORDERED THAT, 47 C.F.R. § 1.1203 IS WAIVED to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association
NECA Tariff FCC No. 5

Transmittal Nos. 508 and 520

ORDER

Adopted: December 8, 1992; Released: December 8, 1992

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On September 10, 1992, the National Exchange Carrier Association (NECA) filed a tariff revision to modify its procedures for computing the number of presubscribed lines used for billing and collecting the Universal Service Fund (USF) and Lifeline Assistance (Lifeline) programs. The change reduces the interval between the date of the presubscribed line counts and the billing period, and provides a mechanism to adjust billing based upon an average of presubscribed lines attributable to each interexchange carrier (IXC) for each billing period.[1] On September 25, 1992, Allnet Communications Services, Inc. (Allnet) filed a petition to reject NECA's transmittal. On the same day MCI Communications Corporation (MCI) filed a petition to reject, or alternatively to suspend and investigate. NECA filed its reply on October 5, 1992.

2. Under NECA's current tariff, when it files cost support with the semi-annual USF and Lifeline submission, NECA displays the total number of presubscribed lines based on a count taken 12 months earlier, for all IXCs that qualify. It then uses these numbers in the development of its monthly rates for USF and Lifeline. Simultaneously, NECA informs each qualifying IXC of its total number of presubscribed lines and works informally to resolve discrepancies. Once resolved, the counts are used for a fixed six-month period. NECA Description and Justification (D&J), Transmittal No. 508 at 1-3.

3. In the Transmittal 508 D&J and in its reply, NECA describes the procedure it intends to use to compute presubscribed line counts after June 30, 1993. First, instead of using one-year-old data, NECA intends to use six-month-old data. Then, it will make an interim adjustment to the first six-month billing period during the second billing period. According to NECA, "[t]his adjustment will reflect the actual presubscribed line count at the start of the first billing, which lags the initial count by six months. The interim adjustment will reflect the mathematical difference between the initial count used during the billing period and the more current count reflecting the actual number at the beginning of the period. A final true-up of the first billing period presubscribed lines will be made during the third billing period.[2] IXCs that qualify for the first time to pay USF and Lifeline charges will not be charged for the first billing period. D&J at 3-5.

4. MCI asserts that NECA has not presented evidence of any flaw in the current procedure to justify a change or sufficient explanation in support of the proposed procedure. MCI Petition at 2-4. MCI also claims that the proposed billing methodology will needlessly increase NECA administrative costs, and that the proposed methodology causes a mismatch in time periods used for presubscribed line counts versus costs. *Id.* at 4-6.

5. Allnet voices uncertainty as to the meaning of various terms contained in NECA's proposed revisions, and questions the significance of NECA's use of an average presubscribed line count instead of the final count in a billing period. Allnet Petition at 2. Further, Allnet asserts that NECA's proposed methodology is unfair because it would provide a credit to IXCs that initially qualify to be billed, but later fall below the .05 percent threshold. In addition, NECA would not bill until the next billing period those IXCs that are initially not qualified, but are shown in a later count to meet the .05 percent threshold. *Id.* at 2-3.

6. In reply, NECA generally argues that neither Allnet nor MCI provide any substantial basis for rejection or suspension of NECA's proposed revisions. NECA Reply at 2-3. NECA also maintains that its proposed changes improve the existing methodology because they reflect more current presubscribed line counts of IXCs and more accurate current market shares of IXCs. NECA further argues that the changes will enable it to account more rapidly for changes in IXC presubscribed line counts resulting from normal growth, mergers, acquisitions and asset transfers. *Id.* at 2-5.

7. NECA asserts that the current 12 to 18 month lag between presubscribed line counts and billing has made some dispute resolutions impossible. *Id.* at 4. NECA also contends that the proposed method will not require additional data to be collected and will require only minimal up-front programming expenses. *Id.* at 6. According to NECA, the cost to improve the current system is small and is outweighed by the administrative costs of dispute resolution involving out dated bills. NECA further contends that the timing mismatch in presubscribed line counting and USF revenue determinations should not "stand in the way of improvements in data gathering and reconciliation of the presubscribed line side." *Id.* at 6-7. Finally, with respect to questions raised by Allnet concerning the clarity of the proposed tariff language, NECA provides some clarifications in its reply. *Id.* at 7-9.[3]

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[1] Under Sections 69.116 (Universal Service Fund) and 69.117 (Lifeline Assistance) of the Commission's Rules, NECA is required to compute the USF and Lifeline charges on a semi-annual basis by dividing one-12th of the projected annual USF and Lifeline revenue requirements by the total number of presubscribed IXC lines. 47 C.F.R. §§ 69.116 and 69.117. IXC information concerning presubscribed lines is to be filed with NECA on June 30 based on information available the previous December 31, and on December 30 based on information available the previous June 30. Sections 69.116(a) and 69.5(d) also require NECA to bill and collect USF and Lifeline charges from IXCs that have at least .05 percent of the total presubscribed lines. The rules do not specify the time period for computing the line counts for the purpose of billing.

[2] NECA Reply at 4.

[3] NECA filed tariff revisions to clarify its proposed tariff language on November 20, 1992 under Transmittal No. 520. On November 25, 1992, MCI filed a petition to reject, or in the alternative to suspend and investigate NECA's Transmittal 520. In its petition against Transmittal 520, MCI states that the

8. The Common Carrier Bureau has reviewed NECA Transmittal Nos. 508 and 520, the Allnet and MCI petitions, and NECA's reply. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

9. Accordingly, IT IS ORDERED that the petition to reject the National Exchange Carrier Association's Tariff F.C.C. No. 5, Transmittal No. 508, filed by Allnet Communications Services, Inc., IS DENIED.

10. IT IS FURTHER ORDERED that the petition to reject or alternatively to suspend and investigate the National Exchange Carrier Association's Tariff F.C.C. No. 5, Transmittal No. 508, and the petition to reject or alternatively to suspend and investigate the National Exchange Carrier Association's Tariff F.C.C. No. 5, Transmittal No. 520, filed by MCI Communications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy),
Common Carrier Bureau

language changes effected by the transmittal clarify the presubscribed line count methodology; however, MCI argues that the changes do not address the specific USF and Lifeline rates NECA will apply to individual billing periods. MCI Petition, Tr. 520, at 2 and 4-5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 137, 145
Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 674, 678
Centel Telephone Companies Revisions to Tariff F.C.C. No. 1	Transmittal Nos. 212, 214
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1600

ORDER

Adopted: December 8, 1992; Released: December 8, 1992

By the Acting Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. On November 18, 1992, the NYNEX Telephone Companies (NYNEX), the Ameritech Operating Companies (Ameritech), the Centel Telephone Companies (Centel), Pacific Bell (Pacific), and Rochester Telephone Corporation (Rochester) filed interim tariffs for expanded interconnection with local telephone company facilities pursuant to the Commission's *Expanded Interconnection Order* [1] in CC "Docket No. 91-141. The *Expanded Interconnection Order* required those LECs with existing intrastate expanded interconnection arrangements to file federal tariffs allowing interstate special access traffic to be carried over existing state arrangements pursuant to state rates except for the contribution charge.[2] These interim tariffs are scheduled to become effective December 9, 1992, on 21 days' notice.

2. On November 25, 1992, MFS Communications Company, Inc. (MFS) filed a petition to reject in part, or alternatively, suspend and investigate in part, NYNEX's interim tariff; a petition to reject Pacific's interim tariff; and a petition to reject, or alternatively, suspend and investigate Centel's interim tariff. On the same date, Teleport Communications Group (Teleport) filed a petition to reject, suspend and investigate the interim tariffs of NYNEX, Ameritech, and Centel. No petitions were filed against Rochester. Replies were filed by Ameritech on December 4, 1992, and by NYNEX, Centel, and Pacific on December 7, 1992.

II. TARIFFS AND PLEADINGS

A. NYNEX

3. NYNEX Transmittal No. 137 introduces NYNEX's interstate Interim Expanded Interconnection (IEI) service for high capacity special access services.[3] IEI service offers physical collocation.[4] New York Telephone Company (NYT) offers IEI service to both fiber optic and microwave interconnectors[5] throughout the state of New York for both DS1 and DS3 service[6] at certain designated central offices.[7] New England Telephone and Telegraph Company (NET) offers IEI service only to fiber optic interconnectors[8] in the state of Massachusetts for DS1 service[9] at certain designated central offices.[10]

4. Teleport asserts that more cost support is required for most of NYNEX's rates because most of its rates are found in the license agreements between NYNEX and its interconnectors, not in its intrastate tariffs, and so do not fall within the cost support waiver granted by the Commission for "state rates."[11]

5. NYNEX responds that, with only one exception, all NYNEX's state expanded interconnection rates are in its state tariffs. According to NYNEX, only NYT's nonrecurring charge (NRC) for cage design and construction is not in the state tariff, because it is subject to a separate bidding process using outside contractors. NYNEX states that, un-

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, *to be published at* 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*).

[2] *Id.* at ¶ 262.

[3] NYNEX Description & Justification (D&J) at 1. A portion of this transmittal is scheduled to become effective January 2, 1993, on 45 days' notice, and is contingent on Commission approval of NYNEX's November 10, 1992, Emergency Petition for Waiver, which seeks reallocation of certain general support facilities (GSF) expenses from the special access basket to the common line basket, see n.82, *supra*. NYNEX Emergency Petition for Waiver, filed November 10, 1992 (requesting Commission approval for reallocation of certain GSF costs and deferral of the effective date of its expanded interconnection interim tariff to coincide with the 45 days' notice effective date of the second part of its expanded interconnection filing).

[4] *Id.*

[5] *Id.* at 3, 5.

[6] *Id.*

[7] *Id.* at 5. The interconnector will run its cable through the cable vault and connect the cable to its own equipment. NYNEX Tariff F.C.C. No. 1, Section 29.1(a)(8).

[8] NYNEX D&J at 3, 5.

[9] *Id.* at 3, 5.

[10] *Id.* at 5. The interconnector will run its cable to the serving wire center manhole outside the central office and leave sufficient cable for NET to run the cable from this meetpoint to the cable vault, splice it to customer-provided fire retardant riser cable, and deliver it to the interconnector's equipment in its designated location on a time and material basis. NYNEX Tariff F.C.C. No. 1, Section 29.1(B)(17)-(18). NET will also maintain interconnector-provided cables between the manhole meetpoint and the interconnector's equipment on a time and material basis. NYNEX D&J at 4.

[11] Teleport Petition at 6 & n.11.

like NET, NYT does not assess interconnectors a flat NRC for the design and construction of the collocated space or cage.[12] Rather, NYNEX explains, NYT charges an initial application fee of $7,500, solicits competitive bids from outside contractors to design and construct the cage, and incorporates the lowest contractor bid into the agreement as the price for the cage. NYNEX states that while this benefits interconnectors, it also precludes NYT from incorporating into its tariffs a fixed NRC for cage design and construction.[13] NYNEX asserts that it filed its state rates, less contribution charges, as the rates for its interstate interim expanded interconnection service. NYNEX also argues that cost support is not required because the Commission expressly waived this requirement for the interim expanded interconnection tariffs.[14]

6. MFS alleges that NYNEX's NRCs for service rearrangement (circuit rollover) for interconnected circuits differs from those NYNEX charges for non-interconnected circuits and is thus unreasonably discriminatory and anticompetitive. MFS further asserts that the *Expanded Interconnection Order* expressly prohibits such discrimination by requiring that NRCs for reconfiguration be applied in a neutral manner.[15]

7. NYNEX replies that MFS is wrong for several reasons. NYNEX asserts that the *Expanded Interconnection Order* mandates that interim expanded interconnection rates mirror existing state rates, and that the rollover charges in question are contained in its state expanded interconnection tariffs and thus are required to be included in its interim interstate tariffs.[16] NYNEX also asserts that MFS's reliance on paragraph 203 of the *Expanded Interconnection Order* is misplaced because that paragraph deals with requirements for the permanent expanded interconnection tariffs, not the interim tariffs. NYNEX further argues that even assuming paragraph 203 applies, NYNEX's proposed NRCs for rollovers comply with the *Expanded Interconnection Order* because they are applied in a neutral manner based on cost differences.[17] NYNEX asserts that the costs of rollovers to its own high capacity services are recovered through recurring rates for these services, but that it can only recover the costs of rollovers to interim expanded interconnection arrangements by a NRC.[18] NYNEX further argues that these NRCs will not place interconnectors at a competitive disadvantage because interconnectors can recover these costs through the recurring rates that they will then charge their customers.[19]

8. MFS and Teleport want clarification that NRCs for processing a collocation application and preparing the interim collocation space apply only to customers who request new arrangements under the federal tariff, and not to existing customers of NYNEX's intrastate collocation tariff, so as to prevent double recovery of such charges by NYNEX.[20] NYNEX replies that it has amended its tariff to clarify that interconnectors may "reuse" space obtained pursuant to state expanded interconnection arrangements for interim interstate expanded interconnection without being assessed a second time identical interstate charges for the same space.[21]

9. Teleport requests rejection of Section 29.1(A)(9), which states that the interconnector will be responsible for any nonrecurring cost incurred by NYNEX, because this section is too vague and does not list specific NRCs.[22] NYNEX responds that, contrary to Teleport's claim, this section clearly states that these costs will be calculated on the time and material rates specified in Section 13 of the tariff.[23]

10. MFS asserts that clarification is needed that Section 29.1(B), which permits NYNEX to administer a collocated space under the same regulations as specified in NYNEX's tariff for a customer premises, does not reduce the amount of interconnector control to install and maintain its equipment or limit access by the interconnector to its collocated space.[24] NYNEX replies that interconnectors have precisely the same level of control and access to collocated space as in the state tariff.[25] NYNEX further states that it has amended its tariff to specify that interconnectors may access their collocated space at all times.[26]

11. MFS also requests clarification that the statement in NYNEX's D&J that NET will install and maintain the interconnectors' fiber optic facilities refers only to an interconnector's facilities between the serving wire center manhole and the interconnector's collocated space, and does not establish that NET may install and maintain the interconnector's equipment located within its collocated space, thereby converting NET's physical interconnection into a virtual collocation arrangement.[27] Teleport also interprets this provision as prohibiting an interconnector from installing and maintaining the equipment in its collocated space and requests its rejection.[28] NYNEX responds that this tariff provision is identical to that in NET's state expanded interconnection arrangements, and that these arguments raise no issues that warrant rejection for the interim collocation filings.[29] NYNEX explains that NET included the provision requiring its own personnel to install the interconnector's fiber optic facilities from the manhole to the interconnector's space because of its collective bargaining agreement with its unionized employees, and that eliminating this provision would raise significant labor and legal issues which NET cannot resolve in the limited time afforded for this filing.[30]

12. MFS notes that the equipment specified in NYNEX's tariff as being permissible to collocate does not include SONET-based terminating equipment, and requests that this section be clarified so as not to exclude it.[31] NYNEX

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12 NYNEX Reply at 6.
13 *Id.* at 6 n.13.
14 *Id.* at 6.
15 MFS Petition (NYNEX) at 5-6 (citing *Expanded Interconnection Order* at ¶ 203).
16 NYNEX Reply at 7.
17 *Id.*
18 *Id.* at 7-8.
19 *Id.* at 8.
20 MFS Petition at 9-10; Teleport Petition at 7 n.12.
21 NYNEX Reply at 2 n.2.
22 Teleport Petition at 7 n.12.
23 NYNEX Reply at 6 n.12.
24 MFS Petition (NYNEX) at 7.
25 NYNEX Reply at 9.
26 *Id.* at 2 n.2.
27 MFS Petition at 7-8.
28 Teleport Petition at 7.
29 NYNEX Reply at 9.
30 *Id.* at 9-10.
31 MFS Petition (NYNEX) at 8.

responds that this is the first time MFS has raised this issue and that MFS has not provided NYNEX with any information about the equipment it wishes to use. NYNEX states that it has no reason at this time to object to use of such equipment, but that it requires further details from MFS, such as whether the equipment is compatible with NYNEX's network, before it can provide a definitive answer to this question.[32]

13. MFS states that Section 7.1 of the tariff, which states that the interconnector's collocated space will be considered a customer premises for purposes of administering regulations and rates in the tariff, is confusing and contradictory because a collocated space has nothing to do with a customer premises. MFS further argues that this section, combined with Section 7.1.3(A)(4) which imposes a standard channel termination charge on special access service provided between a customer premises and a telephone company hub, would permit NYNEX to impose a channel termination charge, instead of a cross-connection and an unbundled multiplexer charge, when an interconnector cross-connects its collocated equipment to a NYNEX multiplexer. MFS argues that this is unreasonable because a channel termination charge recovers local loop costs which are not present in central office collocation.[33] NYNEX replies that it has amended its tariff to clarify that an office channel termination charge applies when an interconnector cross-connects its collocated equipment to a NYNEX central office hub.[34] An office channel termination rate covers cross-connection of an interconnector's collocated equipment and facilities to the telephone company serving wire center. It applies in lieu of a standard channel termination rate for high capacity services utilizing interim expanded interconnection.[35] NYNEX's revision clarifies that an interconnector will pay an office channel termination regardless of the type of telephone company office in which it collocates and cross-connects.[36]

14. MFS and Teleport also object to Section 29.1(A)(16) of the tariff, which requires interconnectors to provide the current service addresses of all interconnector customers. MFS wants submission of the Access Service Request (ASR) for cross-connection to NYNEX services, which MFS alleges contains this information, to be considered compliance with this requirement,[37] while Teleport alleges this requirement has anticompetitive implications and should be rejected.[38] NYNEX responds that it has amended its interim interstate expanded interconnection tariff to remove this provision.[39]

15. Finally, MFS argues that NYNEX's failure to tariff interconnection to DS3 services in NET's service area violates the *Expanded Interconnection Order*.[40] NYNEX replies that NET does not as yet offer this type of expanded interconnection arrangement. Therefore, NYNEX asserts, the tariffing of such an arrangement is clearly beyond the scope of the *Expanded Interconnection Order*, which only requires LECS to tariff on an interim interstate basis the same expanded interconnection arrangements that they currently provide in their state tariffs.[41]

B. Centel

16. Centel Transmittal No. 212 introduces its interstate interim expanded interconnection service, Centel Facility Interconnect Services (CFIS). CFIS offers physical collocation[42] to fiber optic interconnectors[43] for both DS1 and DS3 service at its Des Plaines, Illinois office.[44]

17. Both MFS and Teleport take issue with Centel's cross-connection charges. Teleport asserts that Centel has failed to remove the full amount of the contribution charge from its cross-connection charges for both DS1 and DS3 and that both are priced far above cost.[45] Teleport argues that Centel's cost justification is not convincing because although Centel's charges were reached by reducing its intrastate rates by the amount of its interstate GSF factor, Centel's intrastate charges were not set based on interstate GSF factors. Rather, Teleport alleges that Centel's intrastate charges were "lifted" from the charges in Illinois Bell's tariff and that although Illinois Bell has properly reduced those contribution-laden charges, Centel has not.[46] MFS also charges that Centel's cross-connection charges contain substantial non-cost loadings in direct contravention of the *Expanded Interconnection Order*.[47] MFS argues that this is evident from the disparity between Centel's charges and those of the other carriers filing interim tariffs, each of which charge approximately $4 for a DS1 cross-connection, and $40 for a DS3 cross-connection,[48] in contrast to Centel's charge of $44 for DS1 and $440 for DS3.[49] Teleport further asserts that the Commission required that carriers remove implicit and explicit contribution amounts from all rate elements, not just the cross-connection element. Teleport alleges that since Centel has not been required to furnish cost support, it is unclear whether the rate elements include any implicit contribution amounts.[50]

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32 NYNEX Reply at 8 n.19.
33 MFS Petition at 8-9.
34 NYNEX Reply at 2 n.2.
35 NYNEX Tariff F.C.C. No. 1, Section 7.1.2(A)(2).
36 NYNEX Tariff F.C.C. No. 1, Section 7.1.3(A)(3).
37 MFS Petition at 8 n.11.
38 Teleport Petition at 7.
39 NYNEX Reply at 2 n.2. NYNEX explains that this provision is in NYT's state expanded interconnection tariff because interconnectors are allowed to provide certain local exchange services to end users in New York and because NYT must maintain customer information for 911 emergency service. NYNEX states that since interim interstate expanded interconnection will not involve the provision of local exchange service, there is no problem with removing it from the federal tariff. *Id.*
40 MFS Petition at 10-11.
41 NYNEX Reply at 10.
42 Centel Tariff F.C.C. No. 1, Section 15.1(A)(1)-(2).
43 *Id.* at Section 15.1(A)(1). *See also id.* at Section 2.6, Customer Transport Facilities definition.
44 *Id.* at Section 15.1(A)(6); Centel D&J at 1. The interconnector will run its fiber optic cable to a manhole or other Centel-designated location, extend the cable into the central office, and splice the cable to the customer-provided fire-retardant riser cable. Centel will pull the riser cable through the central office building and deliver it to the interconnector's collocated space. Centel Tariff F.C.C. No. 1, Section 15.1(F)(2)(a).
45 Teleport Petition at 3-4.
46 *Id.* at 4 n.6.
47 MFS Petition (Centel) at 1-2.
48 MFS notes that Pacific's interim tariff does not list separate cross-connection charges so it is not comparable to the other filings. *Id.* at 2 n.3.
49 *Id.* at 2-3.
50 Teleport Petition at 4.

18. Centel replies that its removal of GSF costs from its intrastate cross-connection charge to arrive at its interstate cross-connection charge is consistent with the Commission's determination in the *Expanded Interconnection Order* that the only significant non-cost-based support flow imposed by Commission regulations is the overallocation of GSF costs to special access.[51] Centel argues that the petitioners' unsupported allegations that Centel's cross-connection rates must contain a contribution charge merely because they are higher than the other carriers' rates is not enough to support suspension or rejection of Centel's tariff.[52] Centel states that, nevertheless, in order to facilitate the prompt implementation of interstate expanded interconnection service, it has voluntarily reduced its proposed cross-connection charges by benchmarking them to those of NYNEX.[53] Centel asserts, however, that these charges are substantially below its cost of providing the service, and emphasizes that they are only temporary and will expire upon implementation of its permanent expanded interconnection tariff. Centel further asserts that the reduced charges are being offered without prejudice to the level or structure of the charges to be offered in its permanent collocation tariff, and that when it files that tariff, its cross-connection charges will reflect its direct cost plus reasonable overheads as required by the *Expanded Interconnection Order*.[54]

C. Ameritech

19. Ameritech Transmittal No. 674 introduces its interstate expanded interconnection service, Optical Interconnection Service (OIS). OIS offers virtual collocation by providing interconnection to Ameritech's tariffed services through an optical channel interface.[55] Ameritech offers OIS to fiber optic interconnectors[56] in the state of Illinois[57] for both DS1 and DS3 service.[58]

20. Teleport asserts that although Ameritech has properly adjusted its cross-connection charge to a cost-based rate, Ameritech is not correct in claiming that it is therefore in compliance with the Commission's requirement to eliminate contribution amounts from its intrastate charge.[59] Teleport argues that the Commission required that carriers remove implicit and explicit contribution amounts from all rate elements, not just the cross-connection element. Teleport alleges that since Ameritech has not been required to furnish cost support, it is unclear whether the rate elements include any implicit contribution amounts.[60]

21. Ameritech replies that the *Expanded Interconnection Order* only requires it to eliminate contribution charges previously authorized by state commissions, regardless of whether they were recovered as a stand-alone rate element or included in some other rate element, and that the filing of cost support was waived by the Commission.[61] Ameritech further avers that it has complied with the *Expanded Interconnection Order* in all respects. Ameritech asserts that the contribution charge in the Illinois state tariff is recovered as part of the cross-connection rate element and that Teleport acknowledges that Ameritech has properly reduced these rates to eliminate the contribution charge.[62]

22. Teleport also takes issue with Section 16.1(A)(1) of Ameritech's tariff, which Teleport claims requires that Ameritech's interstate collocation service is to be used to "provide those services authorized in that carrier's Illinois Commerce Commission Certification." Teleport argues that intrastate regulatory authorizations are not applicable to interstate service and that this provision should thus be removed.[63]

23. Ameritech responds that this language is taken verbatim from the Illinois Bell state tariff and thus its inclusion is consistent with the Commission's requirement to mirror the state tariff. Ameritech asserts that this provision is necessary to permit only those providers and types of service contemplated by the mirrored state tariff.[64] Ameritech further argues that this language is consistent with the underlying purpose of the Commission's mirroring requirement, *i.e.*, to hasten the expansion of competition by "allowing interstate special access to be carried over existing state arrangements."[65] Ameritech asserts that this language gives no indication that the Commission intended to do anything other than allow interconnectors with intrastate facilities to expand their use of those facilities to include interstate services.[66]

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[51] Centel Reply at 2. Centel notes that it does not necessarily agree with the Commission's views on this matter. *Id.* at 2 n.2

[52] *Id.* at 3.

[53] *Id.*

[54] *Id.* at 4. Centel further states that if the Commission or a court extends or stays the implementation date of the permanent expanded interconnection tariffs, Centel reserves the right to revise its interim rates to more accurately reflect its costs. *Id.* at 4 n.7.

[55] Ameritech Tariff F.C.C. No. 2, Section 16.1(A)(1). The interconnector will run its fiber optic cable to an agreed upon Ameritech-designated meetpoint, such as a manhole, outside a central office where it will be connected with Ameritech-provided fiber optic transport facilities, including equipment to convert optical and electrical signals. *Id.* at Section 16.1(A)(2).

[56] *Id.*

[57] *Id.* at Section 16.1.

[58] *Id.* at Section 16.2(B).

[59] Teleport Petition at 2.

[60] *Id.* at 2-3.

[61] Ameritech Reply at 1-2.

[62] *Id.* at 2. Ameritech also asserts that the cross-connection rates in its interim tariffs would likely be shown to be too low if a cost study were to be conducted. Ameritech states that the current rates were developed for Illinois intrastate services and do not include the overheads which would be consistent with interstate methodologies. Ameritech states that this factor, combined with the steep cut in its cross-connection charge to eliminate contribution, cause it to seriously question whether its rates for expanded interconnection are unconstitutionally confiscatory. Ameritech asserts that it has opted not to pursue this matter because the interim tariff will only be effective for a few months. *Id.*

[63] Teleport Petition at 3.

[64] Ameritech Reply at 3.

[65] *Id.* (quoting *Expanded Interconnection Order* at ¶ 262).

[66] *Id.* Ameritech further states that it fails to see why Teleport is concerned about this language since Teleport is certificated in Illinois to carry special access services. Ameritech asserts that it does not construe the certificate as limiting Teleport's ability to provided interstate special access. *Id.*

D. Pacific

24. Pacific Transmittal No. 1600 introduces its interstate Interim Expanded Interconnection Service (IEIS). IEIS offers virtual collocation[67] to fiber optic interconnectors[68] for DS1 and DS3 service.[69] IEIS provides one 90 Mbps high capacity service between Pacific's SNFCCA 01/03 San Francisco central office and its manhole in the 500 block of Pine Street, San Francisco.[70] The service period is 10 years, with an option for either party to terminate after five years by providing at least 12 months' notice.

25. MFS argues that Pacific was incorrectly identified by the Commission as one of the LECs that must file an interim tariff because Pacific does not have an interim collocation agreement generally available to all interconnectors as do the other carriers filing interim tariffs.[71] MFS asserts that Pacific has filed in its interim tariff a customer-specific service to a single party that provides a highly unique form of virtual collocation in one central office in San Francisco.[72] MFS argues that because Pacific's interim tariff mirrors this individual case basis (ICB) arrangement, it is not generally available.[73] MFS continues that it is virtually impossible for any party other than the existing ICB customer to obtain interconnection through Pacific's interim tariff before its permanent collocation tariff takes effect in mid-May 1993.[74] MFS therefore requests that Pacific's interim tariff be rejected.[75]

26. Pacific replies that, notwithstanding MFS' complaint that MFS cannot take advantage of Pacific's offering because it is unique, it is in full compliance with the Commission's requirements.[76] Pacific asserts that the *Expanded Interconnection Order* identifies Pacific as one of the LECs required to file an interim expanded interconnection tariff, that this order permits any customer's interstate traffic to be carried over a "mirror" of Pacific's intrastate arrangement, that Pacific has one intrastate arrangement involving a particular central office for use with particular facilities and equipment, and that Pacific's interim tariff mirrors its state tariff and thus is in full compliance with the *Expanded Interconnection Order*.[77]

27. MFS further asserts that if Pacific desires to pursue an interim interconnection arrangement, it must ensure that all interconnectors be allowed to secure intrastate access by December 18, 1992,[78] and that Pacific has not and cannot make this commitment. In support, MFS cites Pacific's December 19, 1991, letter stating that once Pacific receives an interconnection request, it takes at least four to six months to establish a working interconnection arrangement.[79]

28. In response, Pacific states that it is in full compliance with the Commission's order. In addition, Pacific states that because its tariff reflects an individually negotiated arrangement that takes some months to establish, expediting the arrangement for a different entity before the permanent expanded interconnection offerings take effect is not possible due to operational and regulatory constraints.[80] Pacific therefore requests that its tariff be allowed to go into effect or, in the alternative, that it be released from the requirement of filing its interim tariff.[81]

III. DISCUSSION AND ORDERING CLAUSE

29. The Common Carrier Bureau has reviewed NYNEX Transmittal Nos. 137 and 145, Ameritech Transmittal Nos. 674 and 678, Centel Transmittal Nos. 212 and 214, and Pacific Transmittal No. 1600, the petitions filed by MFS and Teleport, and related pleadings. We conclude that these tariffs do not warrant rejection because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

30. Accordingly, IT IS ORDERED that the petitions filed by MFS Communications Company, Inc. to reject in part, or alternatively, suspend and investigate in part, NYNEX's interim tariff; to reject Pacific's interim tariff; and to reject, or alternatively, suspend and investigate Centel's interim tariff; and the petition filed by Teleport Communications Group to reject, suspend and investigate the interim tariffs of NYNEX, Ameritech, and Centel, ARE DENIED.[82]

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Deputy Chief (Policy)
Common Carrier Bureau

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[67] Pacific D&J at 1-1.
[68] *Id.*
[69] Pacific Tariff F.C.C. No. 128, Section 16.
[70] The customer is responsible for all aspects of construction of its fiber optic cable that will terminate in the manhole where the point of virtual interconnection occurs. Pacific D&J at 1-1.
[71] MFS Petition (Pacific) at 2, 4.
[72] *Id.* at 3.
[73] *Id.*
[74] *Id.* at 4-5.
[75] *Id.* at 7.
[76] Pacific Reply at 2.
[77] *Id.* at 1-2.
[78] MFS Petition at 4. MFS is in error with respect to the effective date of the interim expanded interconnection tariffs. The tariffs are scheduled to take effect December 9, 1992, not December 18, 1992.
[79] *Id.* at 4-5.
[80] Pacific Reply at 2.
[81] *Id.* at 2-3.
[82] We note that we are not taking action at this time on the portion of NYNEX Transmittal No. 137 that reallocates certain GSF expenses from the special access basket to the common line basket, reduces certain special access rates and increases carrier common line and end user common line rates. We will act upon this filing in a separate order, and do not address the arguments against this part of NYNEX Transmittal 137 in this order. We further note that given the substantial differences between the requirements for the interim and permanent expanded interconnection tariffs, our decision not to suspend or reject the interim tariffs should not be construed as precedent for our review of the permanent tariffs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4594
Tariff F.C.C. No. 2

ORDER

Adopted: December 11, 1992; Released: December 11, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 17, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective December 15, 1992. This filing increases rates for AT&T 800 Referral Service.

2. On November 24, 1992, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal No. 4594.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4594 and MCI's petition. We conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4594, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 92-234

In the Matter of

Inquiry into Encryption Technology
for Satellite Cable Programming

ORDER EXTENDING DEADLINE FOR FILING REPLY COMMENTS

Adopted: December 11, 1992; Released: December 14, 1992

Comment Date: December 24, 1992
Reply Comment Date: January 22, 1993

By the Chief, Office of Plans and Policy:

1. The Commission has received a "Request for Extension of Time for Reply Comments" in the above-captioned proceeding. The Satellite Broadcasting and Communications Association (SBCA) filed this request on November 24, 1992, asking for an extension from January 8, 1993 to January 25, 1993.

2. In support of its request, SBCA states that this proceeding "addresses an issue of substantial interest to the satellite industry" and suggests that the reply comment interval is "a sufficiently compressed period so as to create a serious burden on the parties to the NOI who wish to review carefully the comments filed and prepare their reply comments diligently." Good cause for an extension having been shown, IT IS ORDERED that the deadline for reply comments in PP Docket No. 92-234 is extended to January 22, 1993. This additional filing time will enhance the ability of commenters in general, and SBCA in particular, to obtain and analyze pleadings in order to submit reply comments that include comprehensive analyses of the issues raised in the Commission's *Notice of Inquiry* in PP Docket No. 92-234. This action is taken pursuant to Section 4(i) of the Communications Act of 1934, as amended, under authority delegated to the Chief, Office of Plans and Policy by Section 0.271 of the Commission's Rules, 47 C.F.R. §0.271.

FEDERAL COMMUNICATIONS COMMISSION

Robert Pepper
Chief
Office of Plans and Policy

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 14, 1992

BROOKINGS MUNICIPAL TELEPHONE FILES PETITION FOR WAIVER TO ISSUE ITS OWN INTERSTATE TRAFFIC SENSITIVE TARIFF

Pleading Cycle Established

COMMENTS: December 21, 1992
REPLY COMMENTS: December 28, 1992

On November 24, 1992 Brookings Municipal Telephone (BMT) filed a petition for waiver of Section 61.39(b)(2) of the Commission Rules, 47 C.F.R. § 61.39(b)(2), to issue its own interstate Traffic Sensitive tariff. BMT currently participates in the National Exchange Carrier Association (NECA) access tariffs and pools. BMT plans to include in the tariff market-based rates for interstate special access services that are less than rates calculated according to BMT's average schedule settlements from NECA.

BMT asserts that the requested waiver is necessary to enable BMT to try to compete with US West Communications, Inc. for carriage of the special access traffic of BMT's local exchange customers. BMT states that it must notify NECA by December 31, 1992 of its plan to leave the pool.

Interested parties may file comments regarding BMT's petition no later than December 21, 1992. Reply comments may be filed no later than December 28, 1992.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1990 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the petition and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 15, 1992

Report No. DS-1265

MSS ABOVE 1 GHZ NEGOTIATED RULEMAKING COMMITTEE

CC Docket No. 92-166

Action: Notice of Advisory Committee Establishment.
Notice of Advisory Committee Meetings.

Summary: The Federal Communications Commission has established the MSS Above 1 GHz Negotiated Rulemaking Committee (Committee). The Committee will provide expert advice and recommendations on technical matters related to the establishment and regulation of a mobile satellite service in the 1610-1626.5/2483.5-2500 MHz frequency bands. The establishment of this Committee is necessary and is in the public interest.

In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice also advises interested persons of the initial and proposed subsequent meetings of the Committee.

Dates: Wednesday, January 6, 1993, at 9:30 a.m.
Tuesday, January 12, 1993, at 9:30 a.m.
Tuesday, January 26, 1993, at 9:30 a.m.
Wednesday, February 3, 1993, at 9:30 a.m.
Monday, February 8, 1993, at 9:30 a.m.
Wednesday, February 17, 1993, at 9:30 a.m.
Thursday, February 25, 1993, at 9:30 a.m.
Wednesday, March 3, 1993, at 9:30 a.m.
Tuesday, March 9, 1993, at 9:30 a.m
Thursday, March 18, 1993, at 9:30 a.m.
Wednesday, March 24, 1993, at 9:30 a.m.
Tuesday, March 30, 1993, at 9:30 a.m.

Address: Federal Communications Commission, 1919 M Street, N.W., Room 856, Washington, D.C. 20554.

Supplementary Information: The Committee was established by the Federal Communications Commission to bring together applicants, existing users of the frequency bands, and other affected entities, to discuss and to recommend approaches to resolve technical sharing and coordination issues involved in the establishment and regulation of a new satellite service. The FCC has solicited nominations for membership on the Committee pursuant to the Negotiated Rulemaking Act of 1990, Pub. L. 101-648, November 28, 1990, and will select members to achieve a balanced membership given the purposes and objectives of the Committee. *See* Public Notice in CC Docket No. 92-166, 57 FR 39661 (September 1, 1992), 7 FCC Rcd 5241 (1992).

The agenda for the first meeting is as follows:

1. Introductory Comments: Gerald P. Vaughan, Deputy Chief Common Carrier Bureau; Thomas S. Tycz, Designated Federal Officer and Deputy Chief, Domestic Facilities Division
2. Selection of Facilitator
3. Approval of Agenda
4. Committee Charter
5. Committee Membership
6. Work Program
   -Tasks
   -Schedule
   -Report
7. Organization of Work
   -Identification of Available Information
   -Informal Working Groups
8. Agenda for Next Meeting
9. Other Business

At subsequent meetings, the Committee will seek to determine and to recommend approaches to resolve the domestic sharing problems among the applicants and to resolve potential coordination problems with existing users of the spectrum and with users in adjacent frequencies. The Committee will also discuss international sharing and coordination issues.

Members of the general public may attend the meetings. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to Fern J. Jarmulnek, Staff Attorney, Satellite Radio Branch, before each meeting.

For Further Information Contact: Kathleen A. Campbell, Administrative Assistant of the MSS Above 1 GHz Negotiated Rulemaking Committee, at (202) 634-1952.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 14, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEWSPAPER ASSOCIATION OF AMERICA'S APPLICATION FOR REVIEW OF SWBT'S STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

On December 2, 1992, the Newspaper Association of America (NAA) (formerly the American Newspaper Publishers Association) filed an application for review of the Common Carrier Bureau's Memorandum Opinion and Order (MO&O) removing the structural separation requirements for Southwestern Bell Telephone Company (SWBT). NAA argues that the Commission should review and reverse the Bureau's MO&O granting SWBT structural relief, or it should remand the MO&O for further consideration by the Bureau.

Pursuant to the *BOC Safeguards Order*, 6 FCC Rcd 7571, each Bell Operating Company (BOC) is permitted to petition the Commission for relief from the structural separation requirements if it is technically prepared to offer its ONA services, has effective federal tariffs for each of its initial interstate ONA services, and has filed state tariffs for each of its initial intrastate ONA services.

NAA argues that the Commission's non-structural stafeguards fail to provide sufficient protection against anticompetitive conduct by the BOCs. In addition, NAA states that SWBT did not demonstrate its compliance with the requirements for structural relief but rather stated that it satisfied the requirements. NAA also argues that the Common Carrier Bureau was too hasty in acting on SWBT's petition. NAA states that, since petitions for review are pending before the Courts on the Commission's decision to replace structural separation with non-structural safeguards, the Commission should wait until the Courts decide this issue.

Interested parties should file comments on NAA's application for review by **January 19, 1993**, and reply comments by **February 9, 1993**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of the application can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access
for 800 Service

ORDER

Adopted: November 20, 1992; Released: November 20, 1992

By the Commission:

I. INTRODUCTION

1. On September 2, 1992, the Ad Hoc Telecommunications Users Committee filed a Petition for Expedited Declaratory Ruling (Ad Hoc Petition), requesting that the Commission rule that local exchange carriers (LECs) may not use the 800 data base for six-digit NXX screening[1] in order to route 800 traffic to interexchange carriers (IXCs) during the transition to mandatory data base access if access times would exceed the standards set forth in the Memorandum Opinion and Order on Reconsideration in this docket.[2] Ad Hoc also argues that the public would be best served if the use of 800 data base technology to route traffic did not begin until the first quarter of 1993.

2. On September 24, 1992, the Financial Services Providers, representing the California Bankers Clearing House Association, New York Clearing House Association, VISA U.S.A., Inc., and MasterCard International, Incorporated, filed a Petition for Expedited Action (Financial Services Providers Petition) requesting a three-month delay in the March 4, 1993, deadline for implementation of mandatory data base access. We now grant in part the Ad Hoc and Financial Services Providers Petitions. Specifically, we delay the March 1993 deadline until May 1, 1993, and we order LECs to defer until January 1993 further switch conversions that would route 800 traffic to the data base for a six-digit NXX screening.

II. BACKGROUND

3. The *Reconsideration Order* established revised access time standards for the implementation of the 800 data base system. Under the revised standards, each LEC may replace the current NXX access system with mandatory data base access when that LEC can reduce access times for 97% of its originating 800 data base access traffic to five seconds or less, provided that, within two years thereafter, (a) none of its 800 data base traffic experiences an access time of greater than five seconds, and (b) the mean access time for all of its 800 data base traffic is 2.5 seconds or less. The Commission required the Bell Operating Companies (BOCs) and GTE to meet the 5-second/97% standard by March 4, 1993. Subsequently, the Common Carrier Bureau granted limited waivers of the March 1993 access time standard to each BOC and GTE.[3]

III. THE AD HOC PETITION FOR EXPEDITED DECLARATORY RULING

4. Ad Hoc notes that before implementing mandatory data base access, each LEC plans to test its data base system by using its system for six-digit NXX screening of live 800 traffic. Ad Hoc expresses concern that several LECs plan to begin this transition to six-digit data base screening during the fourth quarter of 1992. It states if this occurs, access times during the fourth quarter in these LEC regions may exceed the access times established in the *Access Time Waiver Orders*. Ad Hoc claims further that these switch conversions could increase the risk of 800 service outages. Ad Hoc argues that while degradation or disruption of 800 service would be damaging at any time of year, such occurrences would be particularly troublesome during the fourth quarter, when 800 service is most heavily used. Ad Hoc argues that the profitability of the retail, travel, lodging, and credit card industries, in particular, is critically affected by fourth quarter business transactions that use 800 service. Accordingly, Ad Hoc asks the Commission to rule that LECs may not use 800 data base technology to route 800 traffic to IXCs during the transition to mandatory data base access if that would result in access times in excess of the standards set forth in the *Access Time Waiver Orders*. Ad Hoc also asserts that "the public would be best served" if utilization of 800 data base technology to route traffic does not begin until the first quarter of 1993.

5. Several parties filed comments in support of the Ad Hoc Petition. These parties echo Ad Hoc's concerns about the risk of service disruption or excessive access times during the fourth quarter.[4] For instance, First Financial Management Corporation states that it experiences a

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[1] Such six-digit NXX screening would not allow for number portability, which will be possible only after the conversion to data base access is completed. Rather, it will simply conduct NXX screening, which identifies the IXC by reading the first three digits following the 800 prefix, at the data base instead of at the LEC switches.

[2] *See* Provision of Access for 800 Service, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5421 (1991) (*Reconsideration Order*). "Access time" as defined in the *Reconsideration Order* is the time that begins when the caller completes dialing an 800 call and ends when the call is delivered by the originating local exchange carrier (LEC) to an interexchange carrier (IXC). Callers experience additional delay as the call is completed. *Id.* at note 4.

[3] *See* Provision of Access for 800 Service, CC Docket No. 86-10, 7 FCC Rcd 4969 (Ameritech); 7 FCC Rcd 4973 (Bell Atlantic); 7 FCC Rcd 5014 (NYNEX); 7 FCC Rcd 5019 (Southwestern Bell); 7 FCC Rcd 5035 (BellSouth); 7 FCC Rcd 5039 (GTE); 7 FCC Rcd 5042 (Pacific); 7 FCC Rcd 5046 (United); 7 FCC Rcd 5050 (US West)(1992)(the "*Access Time Waiver Orders* ").

[4] *See* Comments on Ad Hoc Petition of ARINC; Allnet; AT&T; the Financial Services Providers; CompTel; CompuServe; Direct Marketing Association; First Financial Management; LDDS and ATC; National Data Corporation; Spiegel; Southwestern Bell; and US West. A complete list of comments on the Ad Hoc and Financial Services Providers Petitions is found in Appendix A.

75-80% increase in credit card processing transactions during the month of December.[5] CompuServe and National Data Corporation also report a significant increase in credit card transactions during that period.[6] Other commenters state that they rely on 800 service for catalog sales and that a disproportionately high number of such sales generally occur during the fourth quarter.[7] These parties all assert that they could be injured if 800 service access times increase during the fourth quarter. National Data Corporation maintains that its terminal equipment may be unable to complete calls if access times increase.[8] CompuServe and First Financial Management Corporation ask that we not only grant the Ad Hoc Petition, but also delay the March deadline for implementation of mandatory data base access.[9]

6. In response to the concerns expressed by Ad Hoc and others, several LECs have agreed to defer use of their data base systems for six-digit screening until the first quarter of 1993. To date, Pactel, US West, Southwestern Bell, and GTE have postponed all six-digit conversions until January 1993, while Ameritech has deferred all but a few conversions.[10] In addition, BellSouth has reduced the number of conversions planned for the fourth quarter 1992.[11] However, BellSouth, along with NYNEX and Bell Atlantic, state that they cannot defer all conversions to 1993 and still meet the March implementation deadline. These LECs argue that in accordance with the nationwide schedule for 800 data base implementation, they must complete all six-digit conversions by early February 1993.[12] They argue that they cannot meet this schedule if they are not able to begin work until January 1993. BellSouth states that adoption of Ad Hoc's request to delay conversion activity until 1993 would require a postponement of mandatory data base access service from March 4, 1993 to May 1, 1993.[13] NYNEX likewise states that a delay in mandatory data base access would be necessary.

7. While BellSouth, Bell Atlantic, and NYNEX state that they must begin six-digit data base screening during the fourth quarter 1992, they state they will not convert any switch until they have made SS7 interconnection available from that switch. They state that they anticipate no deviation from FCC access time standards during the fourth quarter as a result of their conversion activity.[14] Indeed, NYNEX states, because it is coordinating its conversions with the implementation of SS7 interconnection, its access times will actually decease.

8. These LECs maintain, further, that they are taking all necessary steps to minimize the possibility of service disruptions during the six-digit conversion process. NYNEX, for example, states that it has developed extensive testing methods and procedures and that it will provide its technicians with special training for all six-digit conversions and testing.[15] In addition, it states, conversions are completed one switch at a time, between the hours of midnight and 6:00 A.M. when very few calls are originated. If any difficulty is encountered, it states, it would revert to a switch-based NXX screening and cease further conversions until the difficulty is corrected.[16] Likewise, BellSouth states that any translation error during the six-digit conversion process could be corrected within fifteen minutes from the time its network operations center is notified. BellSouth states that "because of the high reliability of common channel signaling (99.9981 percent), problems with signaling and/or data base functions are expected to be extremely remote."[17]

9. LECs offer varying views on Ad Hoc's request that access time standards be met in full throughout the implementation period. Ameritech maintains that LECs are managing a complicated transition process and accordingly require a certain degree of flexibility during the implementation period. It states that LECs must be given leeway to test the 800 data base system in advance of the March 1993 implementation date, even if all hardware and software needed to meet the access time standard is not yet installed in every end office.[18] Ameritech states, nevertheless, that it anticipates virtual compliance with its access time standards during the implementation period.[19] GTE also opposes Ad Hoc's request, claiming that to require that access time standards be met in full throughout the implementation period is a "dramatic modification of the Commission's requirements."[20] Other LECs point out that access times depend not only on LEC capabilities but also on the ability and willingness of IXCs to employ SS7 interconnection where provided.[21] Some of these LECs argue that

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[5] First Financial Management Corporation Comments on Ad Hoc Petition at 4.

[6] CompuServe Comments on Ad Hoc Petition at 3; National Data Corporation Comments on Ad Hoc Petition at 5.

[7] *See* Spiegel Comments on Ad Hoc Petition at 1; Direct Marketing Association Comments on Ad Hoc Petition at 2.

[8] National Data Corporation Comments on Ad Hoc Petition at 3.

[9] CompuServe Comments on Ad Hoc Petition at 4, note 7; First Financial Management Corporation Comments on Ad Hoc Petition at 3.

[10] *See* Southwestern Bell Comments on Ad Hoc Petition at 1; US West Comments on Ad Hoc Petition at 3; letter from F. Gordon Maxson, Director-Federal Regulatory Affairs, GTE, to Donna Searcy, Secretary, FCC, October 19, 1992; letter from Anthony M. Alessi, Director-Federal Relations, Ameritech, to Donna Searcy, Secretary, FCC, November 6, 1992 (Ameritech will route 2.8% of its traffic to the data base for six-digit screening prior to January 1993); letter from William F. Adler, Executive Director, Federal Regulatory Relations, Pacific Telesis, to Donna Searcy, Secretary, FCC, November 18, 1992.p

[11] BellSouth Comments on Ad Hoc Petition at 3; letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC,h) September 16, 1992.

[12] *See, e.g.*, NYNEX Comments on Ad Hoc Petition at 2.

[13] BellSouth Comments on Ad Hoc Petition at 3.

[14] *See* NYNEX Comments on Ad Hoc Petition at 3; Bell Atlantic Comments on Ad Hoc Petition at 1; letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC, September 16, 1992.

[15] NYNEX Comments on Ad Hoc Petition at 3.

[16] *Id. See also* letter from Susanne Guyer, Director Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, September 14, 1992.

[17] Letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC, November 13, 1992.

[18] Ameritech Comments on Ad Hoc Petition at 4.

[19] Pursuant to its access time waiver, Ameritech must achieve an access time of five seconds or less for 87% of its traffic. Ameritech states that in January 1993, it projects to achieve this standard for 86.39% of its traffic. *Id.* at 5.

[20] GTE Comments on Ad Hoc Petition at 3.

[21] BellSouth Comments on Ad Hoc Petition at 2; NYNEX

LECs should not be held accountable for access time increases attributable to IXC SS7 interconnection delays. Others state that the Commission should delay implementation of mandatory data base access so that all SS7 interconnection activity can be completed prior to the use of data base technology.[22]

10. MCI and ITN oppose Ad Hoc's Petition. MCI argues that granting Ad Hoc's request would either delay the introduction of competition in the provision of 800 services, or reduce the time available for testing the reliability of the data base system. MCI maintains that Ad Hoc has not presented adequate justification for actions that would necessitate postponing the March implementation date.[23] MCI asserts that implementation problems that have arisen to date have been adequately addressed, and that the LEC implementation plans assure that the data base system can be implemented without adverse effect on service quality or access times. MCI also maintains that the access time standard proposed by Ad Hoc is unworkable, and that the Commission has been aware that minor deviations from the March 1993 access time standards could occur during the transition period. ITN also opposes the Petition, arguing that the Commission should allow the LECs to continue their testing activities, since a delay in testing would hinder or preclude meeting the March deadline. ITN alsonotes that it does not appear that LECs will deviate from their access time standards to any significant degree.[24]

IV. THE FINANCIAL SERVICES PROVIDER'S PETITION FOR EXPEDITED ACTION

11. The Financial Services Providers ask the Commission to postpone the deadline for implementation of data base access for 800 service for three months, from March 4, 1993, to June 1, 1993. They express concern that critical technical and administrative issues will not be resolved in time for a March 1993 cutover. Noting that half of all credit card authorizations are accomplished via 800 service, they argue that an 800 service failure or an increase in post-dial delay could have a significant impact on their businesses and on the retail economy in general.[25] They ask us to delay the March deadline to eliminate the possibility of these occurrences.

12. In seeking a three-month delay in the implementation date for mandatory data base access, the Financial Services Providers repeat concerns about impaired service during the fourth quarter of 1992. Noting that during the fourth quarter of the year, point-of-sale credit card transactions occur at a rate 50% higher than during the rest of the year, they maintain that any service problem encountered during that period could be disastrous.[26] They state that it is not enough for the Commission to order LECs to postpone six-digit screening conversions until January 1993, since some LECs have indicated that they cannot do so and still meet the March 1993 deadline without increasing the risk of service disruptions. They argue, therefore, that the Commission should postpone both the start of six-digit data base screening and the implementation deadline by the same three-month interval.[27]

13. In addition to their fourth quarter concerns, the Financial Services Providers mention other concerns which, they claim, necessitate a delay in the March deadline. For example, they maintain that the unavailability as of March 1993 of a "view only" function in the Service Management System (SMS), wherein all carriers participating in a customer's 800 service can view that customer's 800 service record, will render the capability to route 800 traffic to several carriers useless.[28] In addition, they maintain that the absence of a backuppower supply for the backup SMS and of a clearly articulated plan by the LECs for handling network congestion highlight the need for more time to ensure a proper implementation of the data base system.

14. Several parties support the request for a delay in the 800 data base implementation deadline. These parties generally express concern that the current deadline presents unnecessary risks of degraded access times or service quality, particularly during the fourth quarter of 1992.[29] CompTel and Cable & Wireless argue that while a delay may be unnecessary, it would be prudent to minimize the risk of a network problem by allowing more time.[30] AT&T states that it has planned an aggressive SS7 interconnection schedule in order to meet the March deadline, but argues that there will almost certainly be unforeseen problems.[31] AT&T argues that if the customers who would benefit from 800 number portability want a delay in implementation, the Commission should grant their request.[32] Southwestern Bell, which itself had earlier requested a delay until September, also supports the request for a three-month postponement.[33] Ad Hoc indicates that some of its members support a delay because of the unnecessary risk of degraded service, while others believe the Commission should gauge further progress before making a decision.[34]

Comments on Ad Hoc Petition at note 1; Southwestern Bell Comments on Ad Hoc Petition at 2-3; US West Comments on Ad Hoc Petition at 4; Pactel Comments on Ad Hoc Petition at 2.

[22] *See* Southwestern Bell Comments on Ad Hoc Petition at 2-3; US West Comments on Ad Hoc Petition at 5.

[23] MCI Reply Comments on Ad Hoc Petition at 2.

[24] ITN Reply Comments on Ad Hoc Petition at 1-5.

[25] Financial Services Providers Petition at 2-6.

[26] Financial Services Providers Petition at 5.

[27] *Id.* at 12.

[28] The SMS is the central data base into which all 800 service records will initially be loaded. Records loaded into the SMS will then be down-loaded to the various LEC data bases around the country. Only one entity will be authorized to interface with the SMS for purposes of making changes to a customer service record, even if the customer uses multiple carriers. A "view only" function, currently scheduled for availability in October 1993, will enable other carriers that may be serving a particular 800 number to obtain access to the SMS for purposes of viewing the record associated with that number, though these carriers will not be able to change that record.

[29] *See, e.g.*, LDDS and ATC Comments on Financial Services Providers Petition at 2-3; CompuServe Comments on Financial Services Providers Petition at 3-5; Allnet Reply Comments on Financial Services Providers Petition at 2-3.

[30] CompTel Comments on Financial Services Providers Petition at 2-3; Cable & Wireless Reply Comments on Financial Services Providers Petition at 1-2.

[31] AT&T Comments on Financial Services Providers Petition at 2-4.

[32] AT&T Comments on Financial Services Providers Petition at 5.

[33] Southwestern Comments on Financial Services Providers Petition at 1-3.

[34] Ad Hoc Comments on Financial Services Providers Petition at 4-5.

15. Other parties oppose the Financial Services Providers' request. MCI, for instance, argues that the LECs have provided sufficient assurance that reliability will not be compromised in meeting the March deadline, and asserts that a delay will result in confusion and disruption.[35] Metromedia also opposes postponing implementation, arguing that it would unnecessarily delay the benefits of 800 number portability, and that no party has provided persuasive evidence that the schedule cannot be met. Metromedia also argues that delaying the conversion date could hinder both the LEC and IXC transition efforts, which have been planned around a March implementation.[36] ARINC and ATA argue that while the fourth quarter may be critical for some industry sectors, the summer season is critical to the airline industry, and they oppose postponing data basep implementation to that time.[37] They argue, further, that the speculative concerns of parties supporting a delay do not warrant a deferral of the economic benefits that will be offered by number portability.[38] ARINC and ATA propose that the Commission institute penalties for failure to meet the March 1993 implementation schedule.[39]

16. Most LECs argue that a delay of the March implementation date is unnecessary. They maintain that they can meet this deadline without compromising service quality or reliability. Bell Atlantic, for example, argues that the 800 data base is not a risky new technology, as the Financial Services Providers have portrayed it, but has been used to route intrastate calls since 1989.[40] NYNEX argues that while a delay would be appropriate if the March deadline presented the risk of a service impairment, NYNEX foresees no such risk and should not be precluded from continuing its current implementation activities.[41] NYNEX argues that access times will actually decrease during the fourth quarter because of SS7 interconnections, and that it has taken precautions to minimize service disruptions.[42] Similarly, Pactel and BellSouth dispute claims a delay is necessary.[43] Pactel details its plans for six-digit data base testing, asserting that these plans present no reason for concern to users. Ameritech expresses concern that the implementation process will lose momentum in the event of a delay.[44]

V. DISCUSSION

17. In the fourteen months since the *Reconsideration Order* was released, substantial progress has been made toward implementing the 800 data base access system. Through diligent work by LECs and IXCs alike, as well as members of the user community, numerous technical and administrative issues critical to a successful 800 data base implementation have been identified and resolved. In addition, SS7 deployment by LECs and IXCs is proceeding at a rapid pace. For example, LECs have completed or are on schedule to complete deployment of all Signal Transfer Points (STPs) and Service Switching Points (SSPs) necessary to implement their data base systems consistent with our access time requirements. Trunk augmentations to handle additional traffic to SS7-equipped tandems are also on schedule. SS7 interconnection work is in progress, and the LECs generally predict that their networks will be ready for SS7 interconnection before the March 4 deadline and that they will have substantially completed implementing SS7 interconnection by that time.[45] To this end, LECs and IXCs have successfully negotiated interconnection arrangements that fully meet necessary route diversity requirements. The completion of these negotiations represents a critical step towards the implementation of full SS7 interconnection. Also, a number of key SMS-related issues have been resolved.

18. Nevertheless, SS7 interconnection activity in a few LEC regions is somewhat behind schedule. While the affected LECs are actively seeking to make up lost ground and maintain that it is possible to do so, these LECs would have to proceed under extremely tight deadlines, with little or no tolerance for error or delay, in order to effect a seamless transition to 800 data base service by March 1993. Under the circumstances, it appears that a brief extension of the deadline for mandatory data base access, from March 4, 1993, to May 1, 1993, would be prudent.

19. This extension will accomplish several goals. First, it will enable the three LECs that plan to begin their conversion to a six-digit data base screening during the fourth quarter of 1992, or that have begun this conversion, to defer further cutovers until 1993, and we now require them to do so. While these LECs have made a strong showing that their fourth quarter switch conversions would not adversely affect access times or pose a significant risk to network reliability, deferring these activities should eliminate even the remote possibility of a problem during this critical period. Second, this delay will give LECs and IXCs

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[35] MCI Comments on Financial Services Providers Petition at 3-6.

[36] Metromedia Comments on Financial Services Providers Petition at 5.

[37] ARINC Comments on Financial Services Providers Petition at 2-4.

[38] *Id.* at 4.

[39] *Id.* at 5.

[40] Bell Atlantic Comments on Financial Services Providers Petition at 1.

[41] NYNEX Comments on Financial Services Providers Petition at 2.

[42] *Id.* at 2-3. *See also* para. 8 *supra*.

[43] BellSouth Comments on Financial Service Providers Petition at 3; Pactel Comments on Financial Service Providers Petition at 2-4.

[44] Ameritech Comments on Financial Services Providers Petition at 1-2.

[45] *See* letter from Susanne Guyer, Director Federal Regulatory Matters, NYNEX, to Donna Searcy, Secretary, FCC, November 5, 1992; letter from Anthony M. Alessi, Director-Federal Relations, Ameritech, to Donna Searcy, Secretary, FCC, November 6, 1992; letter from William Adler, Executive Director Federal Regulatory Relations, Pactel, to Donna Searcy, Secretary, FCC, November 6, 1992; letter from Marie Breslin, Director FCC Relations, Bell Atlantic, to Donna Searcy, Secretary, FCC, November 6, 1992; letter from F. Gordon Maxson, Director-Regulatory Affairs, GTE, to Donna Searcy, Secretary, FCC, November 6, 1992; letter from W.W. Jordan, Director-Federal Regulatory, BellSouth, to Donna Searcy, Secretary, FCC, November 6, 1992; letter from Michael W. Bennett, Director Federal Regulatory, Southwestern Bell, to Donna Searcy, Secretary, FCC, November 9, 1992; letter from Elridge Stafford, Director-Federal Relations, US West, to Donna Searcy, Secretary, FCC, November 5, 1992.

alike more time to complete their SS7 interconnection activities and will thereby ensure that data base service can be implemented without a degradation in 800 service access times. Currently, most LECs state that they will be able to meet our access time standards by March 4, and that they will comply with them throughout the implementation period. A few LECs, however, are as yet uncertain as to whether they will be able to meet these goals in light of the tight deadlines for remaining conversion activities. We believe that by giving these LECs an additional fifty-seven days, we can assure that all necessary SS7 interconnection activity is completed before data base technology is used for the routing of 800 traffic. Third, this additional time will ensure that all necessary testing can be completed and that any problems can be duly identified and corrected without undue time pressures before the data base system is implemented. Finally, this delay will provide independent telephone companies additional time to prepare for 800 data base deployment.

20. We see no compelling reason to delay data base implementation by ninety days, as the Financial Services Providers request. While the Financial Service Providers apparently sought a ninety day delay in order to allow all fourth quarter switch conversions to be deferred to 1993, we are here ordering that only those conversions scheduled between now and December 31, 1992 be rescheduled.[46] Allowing the LECs fifty-seven days to complete these rescheduled conversions should be more than adequate. Moreover, none of the other concerns expressed by the Financial Services Providers persuades us that a longer delay is necessary. For example, the lack of a backup power source for the backup SMS is not, in our view, an issue critical to the initiation of 800 data base service. We note that in the unlikely event of a failure in both the primary SMS (in Kansas City) and the power source for the backup SMS (in St. Louis), 800 service would not be interrupted. Rather, subscribers would only be precluded from changing their 800 service record during the outage. Similarly, claims that the capability to route traffic to multiple carriers is useless without a "view-only" SMS function are overstated. This functionality will be implemented in October 1993, and no party has seriously maintained that manual procedures cannot adequately substitute during the interim period. In any event, deferring the data base system until June 1, 1993, as the Financial Service Providers request, would not obviate the need for manual procedures in lieu of a "view-only" function for at least some period of time.

21. We also deny the request of Ad Hoc, endorsed by the Financial Services Providers, that the LECs be prohibited from undertaking any 800 data base routing during the implementation period if the access time standards established in the *Access Time Waiver Orders* would be exceeded. Given that we have ordered LECs to defer six-digit conversions until 1993 and have given them more time to implement the data base system, we believe that all LECs will be able to comply fully or substantially at all times with our access time standards. Because we do not find a substantial risk that parties will be injured by excessive access times, we are unwilling to adopt a rigid standard that permits no deviations from our access time standards during the implementation period, no matter how small and no matter how brief in duration.

22. Although we here grant a fifty-seven day extension of the deadline for implementation of data base access, we fully expect LECs and IXCs to continue working diligently towards the implementation of this service. Substantial work remains, particularly in interconnecting LEC and IXC networks, and the progress that the industry has made thus far in the implementation process must continue in order for our May 1 deadline to be met. To ensure that there is no relaxation of industry efforts, Commission staff will continue to monitor closely the implementation process. We do not anticipate granting any further extensions of the implementation deadline.

VI. ORDERING CLAUSES

23. Accordingly, pursuant to the authority contained in 47 U.S.C. §§ 151, 154(i) and (j), 201-205, and 218, IT IS ORDERED that the Petition for Expedited Declaratory Ruling filed September 1, 1992 by the Ad Hoc Telecommunications Committee and the Petition for Expedited Action filed September 24, 1992 by the Financial Service Providers ARE HEREBY GRANTED to the extent described in this order and are otherwise DENIED.

24. IT IS FURTHER ORDERED that the provisions in this Order will be effective November 23, 1992.[47]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
Comments on Ad Hoc Petition

Aeronautical Radio, Inc. (ARINC)

Allnet Communications Services, Inc.

Ameritech Operating Companies

American Telephone & Telegraph Company (AT&T)

Bell Atlantic Telephone Companies

BellSouth Telecommunications, Inc.

Competitive Telecommunications Association (CompTel)

CompuServe Incorporated

Direct Marketing Association

Financial Services Providers

First Financial Management Corporation

[46] We note, in this regard, that only one LEC, Bell Atlantic, initiated six-digit conversions prior to mid-November 1992.

[47] The effective date of a rule may be made less than 30 days from publication in the Federal Register where good cause exists. *See* 5 U.S.C. § 553(d)(3). In order to implement expeditiously our requirement that the LECs defer until 1993 any further switch conversions that would route 800 traffic to the data base for six-digit NXX screening, we find good cause to make this order effective three days after its release.

GTE Service Corporation

LDDS Communications and Advanced Telecommunications Inc. (LDDS and ATC)

National Data Corporation

NYNEX Telephone Companies

Pacific Bell and Nevada Bell

Southwestern Bell Telephone Company

Spiegel, Inc.

US West Communications, Inc.

Reply Comments on Ad Hoc Petition

Ad Hoc Telecommunications Users Committee (Ad Hoc)

AT&T

Independent Telecommunications Network (ITN)

MCI Telecommunications Corporation

Comments on Financial Services Providers Petition

Ad Hoc

Ameritech

ARINC and Air Transport Assn. of America (ATA)

AT&T

Bell Atlantic

Bell South

Cable & Wireless Communications, Inc.

CompTel

CompuServe

First Financial Management Corporation

LDDS

MCI

NYNEX

Pacific Bell and Nevada Bell

Southwestern Bell

Reply Comments on Financial Services Providers Petition

Allnet

Bell Atlantic

Cable & Wireless

Financial Services Providers

Metromedia Communications Corporation

MCI

NYNEX

Pacific Bell and Nevada Bell

Southwestern Bell

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

DECATUR TELECASTING, INC.

For Modification of Construction Permit for Station KMPX(TV), Decatur, Texas — File No. BMPCT-880616KE

For Extension of Time to Construct Station KMPX(TV), Decatur, Texas, — File No. BMPCT-890614KG

DECATUR TELECASTING, INC. (Assignor)

and — File No. BAPCT-890303KM

WORD OF GOD FELLOWSHIP, INC. (Assignee)

For Assignment of Construction Permit for Station KMPX(TV), Decatur, Texas

MEMORANDUM OPINION AND ORDER

Adopted: December 3, 1992; Released: December 7, 1992

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration: (a) the above-captioned application of Decatur Telecasting, Inc. (DTI) for the modification of facilities of unbuilt Station KMPX(TV), Channel 29, Decatur, Texas; (b) separate informal objections to that application, filed by Dallas Media Investors Corp. (Dallas Media), licensee of Station KDFI-TV, Dallas, Texas, and by Sammy Thornton (Thornton);[1] (c) the above-captioned application for extension of time to construct the station; (d) the above-captioned application of DTI to assign the construction permit to Word of God Fellowship, Inc. (Word of God);[2] (e) a petition to deny the assignment application, filed jointly by Way of the Cross, Inc. and one of its principals, Ed Bowlds (Bowlds); and (f) related pleadings.[3]

APPLICATION FOR MODIFICATION OF FACILITIES

2. The underlying construction permit for this station was issued on June 16, 1987. Shortly thereafter, the tower on which DTI was authorized to locate was sold, and the new owner would not allow DTI to lease space on it. Even were the authorized site available, however, DTI recognized that operating from there would not be economically feasible. Consequently, the permittee immediately started searching for an alternate site that would allow for service to a greater population, while at the same time, provide principal-community coverage to Decatur. On June 16, 1988, exactly one year after the underlying construction permit was issued, DTI filed the instant modification application to move the transmitter site approximately 50 miles to the southwest in an effort to serve the Dallas-Ft. Worth area.[4]

3. The site proposed on June 16, 1988, and several subsequent ones, however, were later found to be unavailable, and on January 6, 1992, the permittee amended its application to specify the site currently proposed. The application as amended now proposes a directional antenna 183 meters (600 feet) above ground level on a tower located in Dallas, Texas, and utilizing visual effective radiated power of 3980 kilowatts. Grant of the application would result in a Grade B gain area encompassing more than 2,100,000 persons with a corresponding loss area including approximately 150,000 persons. Included in the proposed loss area would be a "white area" of approximately 24 square miles and 621 persons with no other off-the-air television signals and a "gray area" of 21 square miles and 1,365 persons with only one such service.

4. On June 10, 1992, Dallas Media filed an informal objection to the modification application as presently amended. Thornton's informal objection followed on November 26, 1990, arguing many of the same points. Specifically, Dallas Media maintains that the application violates the Commission's environmental rules in that the proposed site would be located in a floodplain and an Environmen-

[1] Thornton is an applicant for a new television station to operate on Channel 68 in Arlington, Texas. His application (BPCT-850422KR), however, was denied by the Commission's Review Board on May 14, 1991, and his application for review is pending. *Charisma Broadcasting Corporation*, 6 FCC Rcd 3411 (Rev. Bd. 1991).

[2] On February 28, 1989, DTI and Word of God agreed to substitute Karen Hicks, the president and sole stockholder of DTI, for DTI in their contract for sale of the station. Without a conforming *pro forma* assignment application filed on FCC Form 316 assigning ownership of the permit from DTI to Hicks, however, Hicks cannot personally serve as the assignee. Consequently, the February 28, 1989, amendment has no effect.

[3] On April 3, 1991, Susquehanna Radio Corporation (Susquehanna) and its subsidiary, KLIF Co., licensee of standard broadcast station KLIF in Dallas, filed an informal objection against DTI's modification application. That objection, however, was premised on Station KMPX operating from a different site than the one it now proposes, and Susquehanna's objection is no longer germane. Consequently, its informal objection will be dismissed as moot.

[4] Because the unavailability of DTI's transmitter site constituted a circumstance beyond its control and because it was diligent in seeking and proposing an alternate site, we find that DTI has complied with Section 73.3534(b) of the Commission's Rules and that grant of its extension application is warranted. For the same reason, we find that consideration of DTI's assignment application, which was filed more than one year after the issuance of DTI's underlying permit, is in order.

tal Assessment was not prepared. Second, both Dallas Media and Thornton contend that the instant proposal would not only fail to provide principal community coverage of Decatur, as required by Section 73.685 of the Commission's Rules, but that the town would also lie outside the station's predicted Grade B contour. Moreover, Dallas Media asserts that operation of the station as proposed would cause objectionable interference to the viewers of Station KDFI-TV in a wide area. In a subsequent pleading, Dallas Media argues that the permittee's proposal to move its transmitter site 51 miles in order to serve the already well served Dallas-Fort Worth area has resulted in significant Grade B losses. Dallas Media contends that a change of such magnitude should be considered in a rulemaking proceeding to reallocate the channel to the Dallas area, and Thornton also asserts that Word of God intends to serve Dallas and not its community of license. Thornton further reasons that if Word of God does not want to serve Decatur, he is willing to apply for the station upon notification of the channel's availability. Dallas Media also notes the permittee's failure to provide an economic showing to support its claim that it must relocate to the Dallas area in order to compete with the existing stations in the market. Moreover, Dallas Media contends that the relocation of the Decatur station to Dallas would have an adverse impact on future implementation of high-definition television in the Dallas area.

5. In opposition, the permittee submits a letter from the City of Dallas acknowledging that the proposed tower site is located in a floodplain, but noting that the erection of television towers is a specified permitted use in that area. The permittee further adds that no objections have been expressed by applicable governmental agencies. With respect to the contention that the station would not provide an 80 dBu signal to Decatur, the permittee submits an engineering showing based on NBS Tech Note 101 prediction methods to demonstrate that the proposed operation would provide a median signal level of 86.2 dBu to Decatur. Additionally, the permittee argues that its proposal meets all of the Commission's spacing requirements and that there is therefore no basis to presume that additional objectionable interference would likely occur. In any event, Word of God, the proposed assignee of the permit, states that it will undertake appropriate corrective action regarding interference should it be needed. With respect to Dallas Media's assertion of significant loss areas created by the proposed move, the permittee states that only nine percent of its authorized service area would comprise the loss area and that the area is well served by other television stations and has a significant cable television penetration. The permittee further argues that it is not abandoning Decatur in favor of Dallas. It notes that the station's main studio will be located within the station's predicted principal community contour and that the station will comply with Commission requirements as to public file and telephone access. The permittee further asserts that the proposed move would have no impact on the initiation of high-definition television service in Dallas, due to the fact that KMPX(TV) is an existing construction permit.

6. *Discussion.* At the outset, we find that the proposed site is appropriate for the construction of a television tower, despite its location in a floodplain. In this connection, we note that the City of Dallas has stated that television towers are a specified permitted use in that area. The question then becomes whether the station will provide the requisite 80 dBu signal to Decatur. In that connection, the application shows that, operating as proposed, the permittee would not provide a predicted Grade B signal to Decatur. Because the terrain between the proposed transmitter site and the community of Decatur is typified by rolling hills sloping upward toward Decatur, however, the permittee utilized an alternative engineering method to demonstrate that the requisite 80 dBu signal would be provided to Decatur. Dallas Media has not contested the propriety of utilizing the Tech Note 101 method for computing principal community coverage but does argue that principal community coverage of Decatur will not be provided. In that respect, Dallas Media takes exception to some of the assumptions DTI made in making its calculations, but has not stated what it believes to be the "correct" assumptions, does not quantify the extent of the alleged error, and does not provide any alternate calculations or measurements. The Commission's engineers, however, have confirmed the applicant's showing under Tech Note 101 that the median signal level in Decatur will be in excess of the required 80 dBu. Thus, we find that the permittee would provide principal community coverage to Decatur. With respect to Dallas Media's contention that operation of Station KMPX(TV) as proposed would cause objectionable interference to its signal, we note that proposal meets all Commission spacing requirements, and Dallas Media is not entitled to any greater protection than that provided by our rules. *See* 47 C.F.R. Section 73.612(a). In any event, Word of God states that it will undertake appropriate corrective action to eliminate any interference, should it be needed.

7. While grant of the proposed modification application would result in a Grade B loss area of 150,000 persons, most of the loss area would be well served by stations from the Dallas-Fort Worth area, Wichita Falls, Texas, the Lawton-Ada-Ardmore, Oklahoma, area, or a combination of those markets. There would, however, be a very small "white area" of 621 persons with no off-the-air signals and a "gray area" of 1,365 persons receiving the off-the-air signal of only Station KXII(TV) in Ardmore. Nevertheless, we note that both of these areas have cable television penetration of at least 70 percent of the households. Moreover, KMPX(TV) is not an operating station, and any projected losses would only be theoretical and not actual. We further note that grant of the application would result in a Grade B gain area encompassing more than 2,100,000 persons.

8. We reject Dallas Media's contention that the proposal is an attempt by Word of God to implement a "de facto" reallocation of the channel from Decatur to Dallas. The Commission abolished its "de facto" reallocation policy in 1983, stating that a licensee would presumptively serve its designated community of license if it provides the requisite signal to the community, if it locates its main studio there, and if it proposes programming that will serve the needs of the community of license. *Suburban Community Policy, Berwick Doctrine and De Facto Reallocation Policy*, 93 FCC 2d 436, 456 (1983), *recon. denied*, 56 RR 2d 835 (1984). Since that time, the Commission has further amended its rules to allow a licensee to locate its main studio anywhere within the station's principal community contour. *Main Studio and Program Origination Rules*, 2 FCC Rcd 3215 (1987). Word of God has stated that it intends to locate its main studio within its predicted principal community service contour, and, as noted previously, the proposed facilities will provide the requisite principal community signal to Decatur. Additionally, Word of God has stated that it "intends to be aware of the problems and issues facing the

service area and will address them through news and public affairs programs." In that connection, the move of the transmitter does not change the licensee's responsibility to be primarily responsive to the needs of its community of license, Decatur. Accordingly, we find that the instant proposal meets the Commission's basic licensing requirements.

9. Dallas Media also contends that grant of the proposed application would effectively circumvent the Commission's "freeze" on the filing of certain television applications in preparation for the advent of high-definition television. The Commission has imposed a "freeze" on the filing of applications for new television stations in many areas of the country, including the vicinity of Dallas; however, the "freeze" does not apply to changes requested by existing stations or to applications on file at the inception of the "freeze". *Advanced Television Systems,* 52 Fed. Reg. 28346 (July 29, 1987), Mimeo No. 4074 (released July 17, 1987). By that, the Commission intended to limit the "freeze" to applications for allocated but unapplied for channels. Because Station KMPX(TV) has already been authorized, any minor modification applications it might subsequently file, consistent with existing spacing requirements, will not be subject to the "freeze", nor will the move adversely affect the Commission's ability to implement ATV in the Dallas area.

10. For the reasons stated above, we do not believe that either Dallas Media or Thornton have raised any substantial and material questions of fact with respect to the modification application. Consequently, that application will be granted.

APPLICATION FOR ASSIGNMENT OF CONSTRUCTION PERMIT

11. On December 27, 1988, DTI entered into an agreement with Word of God for assignment of the construction permit, and the assignment application was filed with the Commission on March 3, 1989. On April 14, 1989, Bowlds filed a petition to deny that application. In support of his petition, Bowlds argued that, on October 11, 1986, he entered into an agreement whereby he would acquire 49 percent of a new corporation that was to serve as the station's permittee. Consequently, he contends that the agreement between DTI and Word of God constitutes a breach of his contract with Hicks and that the instant assignment application should be denied. In that connection, Bowlds asserts that he has filed suit in the state and federal courts claiming breach of contract and seeking specific performance and damages.

12. The Commission has long held that it is not the proper forum for the resolution of private contractual disputes and that any redress should be sought in a local court of competent jurisdiction. *John L. Runner, Receiver,* 36 R.R. 2d 773, 778 (1976). Although we acknowledge the fact that Bowlds has sought judicial action in the matter, at this juncture we are only presented with general, unsupported and conclusory allegations of a breach of contract that have not yet been adjudicated by the courts. Further, Bowlds has not obtained an injunction against the sale of the station requiring deferral of action on the application. *Carnegie Broadcasting Co.,* 5 FCC 2d 882, 885 (1966). Moreover, while the pendency of a lawsuit does not enjoin the Commission from acting on applications, it is our practice to condition the grant of an application on the outcome of the suit so as to remove any possible impact on the litigants' interests. *Chief Washakie TV,* 46 R.R. 2d 1594, 1598, n.7 (1980). Finally, Bowlds has not alleged any other facts which, in any way, reflect adversely upon the qualifications of the assignor or assignee, and we find Word of God qualified to be a Commission licensee.[5] Consequently, we will grant the assignment application.

CONCLUSION

13. Accordingly, for the reasons stated, the informal objection of Susquehanna Radio Corporation IS DISMISSED as moot, the informal objections of Dallas Media Investors Corp. and Sammy Thornton and the joint petition to deny of Way of the Cross and Ed Bowlds ARE DENIED, the above-captioned extension, modification, and assignment applications ARE GRANTED. Grant of the assignment application, however, is without prejudice to whatever action the Commission may deem appropriate as a result of the proceedings in *Way of the Cross, Inc. and E.C. Bowlds v. Karen L. Hicks,* File No. 89 CVS 785 (Gen. Ct. of Justice, Super. Ct. Div., State of North Carolina, filed April 14, 1989); and in *Way of the Cross, Inc. and E.C. Bowlds v. Karen L. Hicks,* Civil Action File No. 2:91 CV00348 (U.S. Dist. Ct. for the Mid. Dist. of North Carolina, Greensboro Div., filed July 15, 1991).

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

[5] With respect to Thornton's statement that he is willing to acquire the station and operate it in Decatur, Section 310(d) of the Communications Act provides that "the Commission may not consider whether the public interest, convenience or necessity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee or assignee." Consequently, we cannot accede to Thornton's wishes in this respect.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PEGASUS
BROADCASTING, INC.
(Transferor)

and File No. BTCCT-920226KO

THE SPARTAN
RADIOCASTING COMPANY,
(Transferee)

For Transfer of Control of
Pegasus Broadcasting of Augusta,
Georgia, Inc., Licensee of
Television Station WJBF,
Augusta, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 1992; Released: December 1, 1992

By the Commission:

1. The Commission has before it for consideration the application for transfer of control of Pegasus Broadcasting of Augusta, Georgia, Inc. (Pegasus of Augusta), licensee of television station WJBF (ABC), Channel 6, Augusta, Georgia, from Pegasus Broadcasting, Inc. (Pegasus) to The Spartan Radiocasting Company (Spartan). Spartan is also the licensee of WSPA-TV (CBS), Channel 7, Spartanburg, South Carolina. Because the Grade B contour of station WJBF overlaps with that of television station WSPA-TV, Spartan seeks consent for a waiver of Section 73.3555(a)(3) of the Commission's Rules (the duopoly, or contour-overlap, rule), which generally proscribes common ownership of two television stations whose Grade B contours overlap. Additionally, Spartan wholly owns the licensee of WTWA(AM) and WTHO-FM, both in Thomson, Georgia and both of which Spartan wishes to divest. Because all of Thomson appears to lie within the Grade A contour of WJBF, Spartan seeks a temporary 90-day waiver of Section 73.3555(b), the one-to-a-market rule.[1] Petitions to deny the transfer application were filed by the licensees of the three other commercial stations in Augusta: WRDW Associates (WRDW), licensee of television station WRDW (CBS), Channel 12; WAGT Television, Inc. (WAGT), licensee of television station WAGT (NBC), Channel 26; and Augusta Family Broadcasting, Inc. (WFXG), licensee of television station WFXG (Fox), Channel 54. Spartan filed an Opposition to the petition, and WRDW and WAGT each filed a Reply to Spartan's Opposition.

BACKGROUND

2. Pegasus, a wholly owned subsidiary of General Electric Capital Corporation (GE Capital), is the sole shareholder of Pegasus of Augusta, licensee of WJBF. GE Capital acquired control of Pegasus in September 1990 in a debt restructuring plan, which, according to a declaration by Pegasus president Thomas Crowley, was intended only as a short-term acquisition. Thus, by November 1990, Crowley notes, Pegasus sent a detailed offering memorandum describing WJBF to 27 parties, including major media companies and nine brokers, resulting in three bids but no definitive agreements due to lack of financing. From February 1991 through September 1991, Pegasus sent offering material to eight other interested parties. This resulted in a letter of intent to purchase the station by another established media company, whose acquisition of WJBF would have created a contour overlap with one of its existing stations. Again, no definitive agreement was reached.

3. In October 1991, GE Capital acquired control of WCSC, Inc., licensee of WCSC-TV (CBS), Channel 5, Charleston, South Carolina, whose Grade B contour overlaps with that of WJBF. As was the case with WJBF, GE Capital acquired its ownership interest in WCSC-TV in order to preserve the station's assets and to continue its operations while a suitable, long-term purchaser could be found. Consequently, in approving this latter transfer of control, the Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, granted GE Capital a 12-month waiver of the duopoly rule, requiring divestiture of either station by the end of that period. This application was filed in compliance with that condition.

4. In January 1992, after a month of discussion, Pegasus and Spartan signed a letter of intent, and now seek our consent to the transfer of control of WJBF. This transfer is to be accomplished by Spartan's purchase, for $23.3 million, plus or minus working capital, of all issued and outstanding stock held by Pegasus. In addition, Spartan is to pay Pegasus $1.5 million as consideration for Pegasus's covenant not to compete. This purchase price, according to Spartan, is $13.2 million less than the original price offered for WJBF by one of the earlier bidders. Spartan, the licensee of four television stations, two in South Carolina, one in Iowa, and one in Florida, is also the licensee or wholly owns the licensee of four radio stations, two in Georgia and two in South Carolina.[2]

[1] The one-to-a-market rule generally prohibits common ownership of radio and television stations where the Grade A contour of the television station encompasses the entire community of license of an AM or FM station. Here, it is not clear from the engineering exhibits submitted by Spartan whether all of Thomson lies within the Grade A contour of WJBF. Rather than expend resources in determining this matter, we will assume, as the applicant has, that the Grade A contour of WJBF encompasses all of Thomson and that the one-to-a-market rule applies.

[2] The television stations licensed to Spartan are: WSPA-TV (CBS), Spartanburg, South Carolina; WBTW (CBS), Florence, South Carolina; KIMT (CBS), Mason City, Iowa; and WMBB (ABC), Panama City, Florida. In addition to its ownership of the licensee of WTWA(AM) and WTHO-FM, Thomson, Georgia, which are the subject here of a 90-day one-to-a-market waiver request, Spartan is the licensee of WSPA(AM) and WSPA-FM, Spartanburg, South Carolina, which are "grandfathered" under the multiple ownership rules.

DUOPOLY WAIVER REQUEST

5. In support of its permanent waiver request, Spartan relies on *Press Broadcasting Co.*, 3 F.C.C. Rcd 6640, 6641 (1988), arguing that the benefits to be achieved by Spartan's proposal outweigh any detrimental effects of the signal overlap. First, Spartan notes, Augusta, Georgia, the community of license of WJBF, and Spartanburg, South Carolina, the community of license of WSPA-TV, are separate markets, each with distinct economies, advertisers and service needs. Augusta, located within the Augusta area of dominant influence (ADI), number 112 in the nation's television markets, is located approximately 120 miles south of Spartanburg, which is located within the Greenville-Spartanburg-Asheville ADI, number 35 in the nation. The Grade A contours of the two stations are separated by a minimum of 31 miles.

6. Second, Spartan contends, the relatively minor Grade B contour overlap of the two stations falls within the range of our past waiver cases. The Grade B contour of WJBF, according to the engineering study submitted by Spartan, encompasses 40,180 square kilometers (15,514 square miles) and 1,273,671 persons, while the Grade B contour of WSPA-TV encompasses 44,701 square kilometers (17,259 square miles) and 2,485,784 persons. The overlap area would encompass 3,074 square kilometers (1,187 square miles) and 96,769 persons, constituting 7.7 percent of WJBF's Grade B contour area and 7.6 percent of its population, and 6.9 percent of WSPA-TV's Grade B contour area and 3.9 percent of its population. Spartan alleges that the largely rural overlap area, composed of a population oriented to the Spartanburg and Columbia ADIs, falls almost entirely outside the Augusta ADI.[3] All but 12 persons in the overlap area, according to Spartan, reside in South Carolina. Moreover, Spartan cites recent surveys conducted by Arbitron and American Newspaper Markets, Inc., which reflect an orientation of the overlap area population to South Carolina-based media. Accordingly, Spartan contends, WJBF and WSPA-TV compete for neither advertising nor viewers in the overlap area. In addition, persons within the overlap area, Spartan notes, will enjoy a continued diversity of voices, with 17 other television stations providing service to portions of the overlap area.[4] A minimum of six, and as many as 12, television stations, according to Spartan, provide a Grade B or better signal to any given location in the overlap area. Further, according to Spartan, WJBF's affiliation with ABC and WSPA-TV's affiliation with CBS will promote continued programming diversity, as does Spartan's guarantee that WJBF will possess autonomy in news, public affairs and other programming decisions.

7. Third, Spartan maintains that the public interest will be served by its acquisition of WJBF because it is a well established broadcaster with local roots, willing and able to "solidify and invigorate WJBF's capacity to serve the Augusta area." Consequently, Spartan alleges, notwithstanding separate programming, common ownership of the stations will yield enhanced programming choices and staff development plans for WJBF, a television station located in the smaller Augusta market. Specifically, Spartan asserts that WSPA-TV will supplement WJBF's only news bureau in Augusta with access to its news bureau in North Carolina and to its six news bureaus in South Carolina, where more than one-third of the TV households in the Augusta ADI are located.[5] In addition, according to Spartan, its mobile van, which is equipped to transmit information to its stations by satellite uplink, will be available to WJBF. Further, Spartan contends it will offer its resources and expertise to enhance WJBF's presently strong agricultural programming and to expand its children's programming. Moreover, Spartan states that it will share with WJBF its experience in implementing staff educational and training programs.

8. Finally, Spartan notes that GE Capital acquired WJBF as only a temporary measure in order to preserve the station's assets. Commission grant of the transaction and concomitant waiver request here, Spartan contends, would enable GE Capital to transfer WJBF to an established, local broadcaster "with the ability and the commitment to invigorate and enhance [WJBF's] local service while maintaining its autonomy."[6]

9. In response to the permanent waiver request, WRDW, WAGT and WFXG, in their petitions to deny, primarily allege that: (1) Spartan's situation does not comport with past duopoly waiver cases, which, they assert, established that where the overlap is not *de minimis*, the Commission has granted permanent waivers only where the waiver

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[3] Of the 96,769 persons within the overlap area, Spartan notes that only 61 reside in the Augusta ADI, while 75,550 reside on the fringe of the Spartanburg ADI and 21,158 reside on the fringe of the Columbia ADI, the eighty-seventh largest television market.

[4] The 12 licensed commercial television stations, in addition to WJBF and WSPA-TV, providing Grade B service to the overlap area are: WBTV, Channel 3 in Charlotte, North Carolina; WYFF-TV, Channel 4 and WGGS-TV, Channel 16 in Greenville, South Carolina; WIS-TV, Channel 10, WOLO-TV, Channel 25, WACH, Channel 57, and WLTX, Channel 19 in Columbia, South Carolina; WRDW-TV, Channel 12, WAGT, Channel 26, and WFXG, Channel 54 in Augusta, Georgia; WAXA, Channel 40 in Anderson, South Carolina; and WHNS, Channel 21 in Asheville, North Carolina. There is an outstanding construction permit for WQHB, Channel 63 in Sumter, South Carolina, which will also provide Grade B service to the overlap area.

The three licensed noncommercial television stations providing Grade B service to the overlap area are: WRLK-TV, Channel 35 in Columbia, South Carolina; WNEH, Channel 38 in Greenwood, South Carolina; and WRET-TV, Channel 49 in Spartanburg, South Carolina. There is an outstanding construction permit for WNTV, Channel 29 in Greenville, South Carolina, which also proposes Grade B service to the overlap area.

[5] The greatest number of South Carolina households within the Augusta ADI is located in Aiken County, South Carolina, adjacent to Augusta and outside the overlap area.

[6] WAGT and Family assert that if Pegasus had been less intent on making a profit or recouping possible losses, it would have lowered its asking price for WJBF so that other buyers may have come forth, thereby possibly avoiding a duopoly situation. However, petitioners have failed to demonstrate that other purchasers were ready, willing and able to acquire WJBF. Indeed, four other offers were received by Pegasus, but did not reach the definitive agreement stage due to financial difficulties. There is no evidence, however, to indicate that these difficulties resulted from the asking price. Further, we note that Spartan's offer is $13.2 million less than the original price offered for WJBF.

would permit improved service to an underserved area or where a failing station would be preserved; and (2) Spartan has alleged no public interest benefits to justify a permanent waiver.

DISCUSSION

10. The ultimate objective of the duopoly rule, as well as the other multiple ownership rules, is to foster economic competition in broadcasting and to promote diversification of programming sources and viewpoints. *Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*, 28 F.C.C. 2d 662 (1971). In adopting the duopoly rule's fixed standard of a prohibited overlap of Grade B service contours, the Commission sought to provide a greater degree of certainty than under its prior rule, which prohibited the common ownership of television stations serving "substantially the same service area." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1476 n.1, *recon. granted in part*, 3 R.R. 2d 1554 (1964). However, the Commission maintained a policy of "flexibility," noting that the rule could be waived in cases where its application would be "inappropriate." *Id.* at 1479 n.12; *John Hay Whitney*, 28 F.C.C. 2d 736, 752 (1971). Accordingly, the Commission has granted waivers of the duopoly rule where signal overlap is *de minimis*, *see, e.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd 7374 (1987), or where the public interest to be gained from waiving the rule would be greater than any detrimental effects resulting from the overlap. *See, e.g., Capital Cities Communications, Inc.*, 59 R.R. 2d 451, 465 (1985)(improved service to underserved area, service to separate and distinct markets, and availability of multiple signals available in overlap area). As for the *de minimis* overlap standard, our past waiver cases have characterized this as an overlap area representing less than one percent of both the area and the population of the Grade B contour of each station. *E.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd at 7374; *Capital Cities Communications, Inc.*, 59 R.R. 2d at 464 n.21; *KSOO-TV, Inc.*, 43 F.C.C. 2d 879, 880 (1973). And, with regard to the second standard, in which the public interest benefits resulting from waiver of the rule are weighed against any detrimental effects of the overlap, we have considered several factors, including the extent of the overlap, the number of media voices in the overlap area, the distinctiveness of the respective markets, the independence of the stations' operation with regard to programming and advertising, and the concentration of economic power. Whether grant of the waiver would permit new service to an underserved area or would allow for the acquisition of a station with financial difficulties have been, as petitioners contend, pivotal factors in our balancing process. However, we believe that in balancing these factors today when considering a waiver request, we are not constrained to limit our analysis solely to the factors underlying the balance struck when the rule was originally adopted or to factors previously considered in waiver cases. In this regard, we believe that as the video marketplace becomes increasingly competitive,[7] the potential diversity and competition detriments from overlapping signal contours generally decrease.

11. In the case before us, although the overlap is not *de minimis* under our precedent,[8] it is clear that WJBF and WSPA-TV do not serve substantially the same area. The size of, and the population within, the overlap area are within the range of past waiver cases. *E.g., Taft Broadcasting Partners Limited Partnership*, 7 F.C.C. Rcd 2854, 2855 (1992)(overlap area encompassed 19.2 percent of the area and 11.4 percent of the population of one station's Grade B contour and 18 percent of the area and 4.3 percent of the population of the other station's); *Silver King Broadcasting of Vineland, Inc.*, 2 F.C.C. Rcd 324 (1986), *recon. denied sub nom. Press Broadcasting Co.*, 3 F.C.C. Rcd 6640 (1988), *aff'd sub nom. Office of Communication of the United Church of Christ v. F.C.C.*, 911 F.2d 803 (D.C. Cir. 1990)(overlap area encompassed 9.8 percent of the area and 5.7 percent of the population of one station's Grade B contour and 10.4 percent of the area and 2.2 percent of the population of the second station's). In addition, the plethora of Grade B television signals in the overlap area, the substantial cable penetration in the overlap area,[9] Spartan's representation that the stations will be programmed separately and distinctly, and Spartan's pledge that WJBF and WSPA-TV will continue their separate network affiliations assure a diversity of voices in the overlap area. Moreover, we find, relying on Spartan's representation that "WJBF does not seek out or sell advertising for establishments in the overlap area," that Spartan will not achieve an undue concentration of economic power. This conclusion is also supported by the orientation of viewers in the overlap area toward the Spartanburg and Columbia markets[10] and the separateness of the Augusta ADI, number 112 in the country, and the Spartanburg ADI, number 35.[11] In view of the above factors, we conclude that any detriment resulting

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[7] *See Review of the Commission's Regulations Governing Television Broadcasting*, 7 F.C.C. Rcd 4111, 4114 (1992).

[8] Spartan does not contend, as WAGT asserts, that the Grade B overlap area between WJBF and WSPA-TV is *de minimis*. However, Spartan does argue that the overlap here is far smaller than that in a number of our past satellite waiver cases. But because Spartan neither proposes a satellite station nor attempts to demonstrate that it meets the criteria of the satellite exception, as enunciated in *Television Satellite Stations*, 6 F.C.C. Rcd 4212 (1991), *reconsideration pending*, we decline to rely solely upon the standards of that exemption to the multiple ownership rules in this case.

[9] Cable penetration, according to data submitted by Spartan, ranges from 61 percent in Greenwood county, which contains more than half of the overlap population, to 32 percent in Abbeville country, 35 percent in Laurens county, and 38 percent in Newberry county, the four counties comprising the overlap area within the Spartanburg and Columbia ADIs.

[10] WRDW attempts to refute Spartan's assertion that the orientation of viewers in the overlap area to Spartanburg is a mitigating factor in the overlap of the two stations. WRDW notes that because fully 35 percent of the Augusta ADI is located in South Carolina, common ownership "will give Spartan an unfair advantage over its Augusta competitors in this regard." However, as Spartan indicates, the 35 percent of the Augusta ADI households in South Carolina, except for 61 persons, are located outside of the overlap area. This orientation to the Spartanburg and Columbia ADIs, as Spartan notes, is evidenced by the substantially smaller share of viewing hours achieved by WJBF and the other Augusta television stations, as compared with Spartanburg and Columbia stations, in the four most populated of the seven counties in the overlap area. The sign-on-sign-off share of the Augusta stations in these counties, which contain 99.6 percent of the population in the overlap area and which are located in the Spartanburg and Columbia ADIs, reaches an average of 22 percent.

[11] WRDW correctly argues that WJBF is regarded under Commission cable rules as being "significantly viewed" in virtually

from the overlap is negligible and that the balance of interests tilts in favor of granting Spartan's request for a duopoly waiver. Further bolstering our conclusion is the position of GE Capital, which acquired control of Pegasus, the licensee of WJBF, in its capacity as a Pegasus creditor in a debt restructuring plan. GE Capital never sought prolonged ownership of the two stations. Indeed, the separate acquisitions of WJBF and WCSC-TV, according to GE Capital's applications, were intended as only short-term measures, in order to preserve the stations' assets, until suitable purchasers could be found. Accordingly, since November 1990, GE Capital has courted potential buyers for WJBF, has received several offers that failed to mature into agreements for lack of financing, and is now ready and willing to dispose of that station for $13.2 million less than the original price offered. Consequently, we are persuaded that granting Spartan a permanent waiver, in order that it may purchase WJBF, in lieu of extending the existing WJBF/WCSC-TV temporary waiver of GE Capital, in order that it may divest WJBF later rather than sooner, is in the public interest as well as consistent with the objectives of the multiple ownership rules.

ONE-TO-A-MARKET WAIVER REQUEST

12. In support of its request for a 90-day waiver of the one-to-a-market rule, Spartan represents that it is "committed to divest" the Thomson, Georgia radio stations, WTWA(AM) and WTHO-FM, licensed to Hickory Hill Broadcasting Company, Spartan's wholly owned subsidiary. In fact, Spartan asserts that it will "finalize arrangements" for the assignment of the stations "[a]s soon as the Commission approves the transfer of control of WJBF." The proposed assignee is the present management of the two stations, which, Spartan contends, will maintain strong service to Thomson, a community with a population of 7,000. Grant of the waiver, according to Spartan, would create no undue concentration of media voices in light of the additional nine AM and 10 FM stations, owned by 15 different licensees, serving the Augusta area. In addition to WJBF, there are five television stations in the Augusta ADI, three of which are licensed to Augusta. Finally, Spartan notes that the Thomson radio stations employ different formats and operate autonomously from all Spartan broadcast stations. Spartan asserts that this autonomy will continue throughout the brief waiver period. The petitioners make no objection to this waiver request.

DISCUSSION

13. In *Amendment of the Broadcast Multiple Ownership Rules*, 4 F.C.C. Rcd 1741, 1753, *recon. denied in part and granted in part*, 4 F.C.C. Rcd 6489 (1989), the Commission indicated that waiver applications would be considered on a case-by-case basis where the stations do not meet the "top 25 market/30 voices" standard or the "failed station" standard. Because the Augusta ADI is not in the top 25 television markets and because Spartan does not allege a failed station, we would analyze a waiver request by balancing the five public interest criteria employed in the case-by-case review: (1) potential public service benefits such as economies of scale, cost savings, and programming and other service benefits; (2) types of facilities involved; (3) number of stations already owned by the applicant; (4) financial difficulties of the station(s); and (5) nature of the market in light of the Commission's diversity and competition concerns. *Id.* at 1753. We do not require that all five criteria be satisfied as a precondition to grant of a waiver. *Amendment of the Broadcast Multiple Ownership Rules Recon.*, 4 F.C.C. Rcd at 6491.

14. We believe it appropriate, due to the short-term nature of the waiver requested here, to focus on the fifth criterion, which embodies the ultimate objective of our multiple ownership rules, including the one-to-a-market rule: promotion of economic competition and diversity of programming and viewpoints. *See Amendment of the Broadcast Multiple Ownership Rules*, 4 F.C.C. Rcd at 1752. Based on Spartan's representations in support of a waiver, we conclude that a 90-day waiver of the one-to-a-market rule could not be utilized to achieve an undue concentration of economic power in the area or to exercise an inordinate effect on public opinion in the Augusta ADI.

15. Accordingly, IT IS ORDERED That the petitions to deny the application of Pegasus Broadcasting, Inc. and The Spartan Radiocasting Company, filed by WRDW Associates, WAGT Television, Inc. and Augusta Family Broadcasting, Inc., ARE DENIED.

16. IT IS FURTHER ORDERED That the request by Spartan for a waiver of Section 73.3555(a)(3) and (b) ARE GRANTED. The application for consent to transfer of control of Pegasus Broadcasting of Augusta, Georgia, Inc., the licensee of television station WJBF, from Pegasus Broadcasting, Inc. to The Spartan Radiocasting Company IS GRANTED, subject to the condition that Spartan divest itself of all interest in, and connection with, radio stations WTWA(AM) and WTHO-FM, no later than 90 days from the date of consummation of the sale of WJBF to Spartan.

17. The staff of the Mass Media Bureau will send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

all of the overlap area. However, as Spartan notes, current viewing data demonstrate that WJBF would not even meet the low three percent total week hours/25 percent net weekly circulation level applicable to new stations pursuant to Section 76.5(i) in three of the counties, and it would only marginally satisfy that threshold in the fourth county comprising the overlap area within the Spartanburg and Columbia ADIs. We find, therefore, that WJBF is not a strong presence in the overlap area so as to threaten any significant diminution of competition with WSPA-TV in the duopoly situation before us.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-350

In re Applications of

EMISION DE RADIO BALMESEDA, INC.	File No. BPH-870505MA
SAFE CARE, INC.	File No. BPH-870505MB
CHAMELEON BROADCASTING, INC.	File No. BPH-8780505MH
DALE BROADCASTING, INC.	File No. BPH-870506MK
FIRST COAST RADIO, INC.	File No. BPH-870506MN
LEEANN KENDALL SCOPINICH	File No. BPH-870506MQ

For Construction Permit
for New FM Station, Channel
293A, Ponte Vedra Beach,
Florida

MEMORANDUN OPINION AND ORDER

Adopted: December 14, 1992; Released: December 23, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The Review Board has before it (1) the *Memorandum Opinion and Order*, FCC 92M-1002, released October 14, 1992, by Administrative Law Judge John M. Frysiak (ALJ), approving a settlement agreement among all of the above-captioned applicants, except Chameleon Broadcasting, Inc. (Chameleon or appellant); and (2) an appeal by Chameleon filed on November 13, 1992. Previously, the ALJ had disqualified Chameleon on a financial issue, *see Initial Decision*, 6 FCC Rcd 5239 (1991); and on exceptions, the Board affirmed the ruling. *Memorandum Opinion and Order*, 7 FCC Rcd 3852 (Rev. Bd. 1992).[1] Appellant urges the Board to rescind the settlement and remand the proceeding on a financial issue against the settlement's contemplated permittee, Emision De Radio Balmeseda, Inc., based on Emision's failure to produce in its Joint Request for Approval of Agreement supporting documentation of its continued financial qualifications in light of the additional settlement expenses.[2] Alternatively, it requests the Board to issue a final decision for purposes of 47 C.F.R. §§ 1.106 and 1.115.[3]

2. We will not disturb the ALJ's ruling on the settlement agreement. Under 47 C.F.R. § 1.229, a party requesting addition of an issue bears the burden of making a *prima facie* showing for adding the issue and must support its request by specific allegations of fact. Mere allegations of additional settlement expenses do not satisfy this burden. *See Susan D. Brown*, 6 FCC Rcd 7210 (Rev. Bd. 1991)(upheld denial of financial issue predicated solely on additional settlement expenses). We stated in *Brown:*

> [W]here an applicant's finances have not been questioned in a proceeding, neither the Commission nor the Review Board has generally required a financial amendment following a partial or global settlement reached among the parties. A Section 1.65 duty to report and amend is "only triggered where an applicant loses reasonable assurance [of adequate financing] after it has filed its application."

6 FCC Rcd at 7210-7211. *See also Evergreen Broadcasting Co.*, 7 FCC Rcd 6601, 6607 ¶ 32 (1992)("[merely] entering into a settlement agreement, whereby the applicant incurs an additional financial obligation, does not require that the applicant amend its application and make an affirmative financial showing"). No financial issue had been designated against Emision; and the appellant has not proffered specific allegations of fact that would warrant a further hearing. Moreover, the ALJ noted that a letter of credit in an amount equal to the reimbursement costs had been placed in the safe deposit box of Emision's law firm and a copy sent to counsel of each of the dismissing applicants; and that Emision, through counsel, also represented once again that it was financially qualified to construct and operate the station. *Order*, para. 6. As for Chameleon's alternative request, we incorporate by reference our prior order affirming Chameleon's disqualification.[4] Having affirmed the disqualification of Chameleon, Emision is the prevailing party.

3. ACCORDINGLY, IT IS ORDERED, That the appeal filed November 13, 1992, by Chameleon Broadcasting, Inc. IS DENIED.

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[1] Our *Memorandum Opinion and Order* remanded the case for further hearing on issues now mooted by the settlement.

[2] The agreement calls for dismissal of the applications in return for reimbursement from Emision for legitimate and prudent expenses.

[3] These rules would, respectively, allow a party to file either a petition for reconsideration with the Board or an application for review with the full Commission.

[4] In our prior *Memorandum Opinion and Order*, we affirmed the ALJ's disqualification of Chameleon on a financial issue because it did not demonstrate (1) that, at the time of certification, it had objectively ascertained whether its proposed lender(s) had sufficient resources to meet any obligation to Chameleon, *see Aspen FM, Inc.* 6 FCC Rcd 1602, 1603 (1991)(citing *Northampton Media Associates*, 4 FCC Rcd 5517 (1989); and (2) that, in any event, Chameleon's purported lender(s) had done no more than evince a willingess to "negotiate" a loan, leaving Chameleon well short of the "firm commitment" which it had claimed "reasonable assurance" of when certifying. *See* 7 FCC Rcd at 3856.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Washington County Rural
Telephone Cooperative

Petition for Waiver of Section
69.605(c) of the Commission's
Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1992; Released: December 16, 1992

By the Chief, Policy and Program Planning Division:

1. "Average schedule companies" are defined in the Commission's rules as telephone companies that were "participating in average schedule settlements on December 1, 1982."[1] This definition has been interpreted by the Commission as permitting average schedule companies to convert to cost study status, but not vice-versa.[2] On August 3, 1992, the Washington County Rural Telephone Cooperative ("Washington") filed a petition for waiver, asking that it be permitted to convert back to average schedule status.[3] As discussed herein, we find that the public interest will be served by granting Washington's petition.

2. In its petition, Washington states that it notified NECA on February 26, 1991 that it would convert to cost-based, pooled settlements effective May 1, 1991.[4] NECA processed this request.[5] Washington states that after it converted, Washington realized that its former manager had been incorrectly advised by a consultant that Washington would receive additional compensation, in the form of Universal Service Fund ("USF") payments, if it converted from average schedule to cost.[6] According to Washington, the decision to convert to cost was based upon the incorrect assumption that two remote switches could be classified as concentrators for the purpose of calculating loop costs for USF settlements.[7] After discovering this error, Washington filed the instant petition.[8]

3. NECA supports Washington's request and urges expedited approval.[9] NECA states that allowing Washington to remain as an average schedule company would enable Washington "to avoid the burdens of completing interstate cost studies both for prior years and for future years."[10] NECA states that the effect of the waiver on NECA's pools would be *de minimis* and granting the waiver would impose no significant administrative burdens on NECA. NECA also states that it "will adjust prior settlements to reflect the difference between the estimated cost settlements [Washington] has received since May 1991 and the amounts it would have received had it remained on average schedules."[11]

4. Washington and NECA have provided sufficient information to enable us to conclude that granting the requested waiver will serve the public interest. Washington converted to cost under the mistaken assumption that it would qualify for USF settlement payments that cannot be justified. Moreover, NECA has stated that prior settlement payments will be adjusted so that the increases in Washington's settlements that arose from Washington's decision to elect cost study status as of May 1, 1991 will be returned by Washington and distributed by NECA to other pool members. Because Washington has elected to remain in average schedule status during the entire period in question, Washington is not, and was not, entitled to receive interstate settlement compensation above that specified in the schedules either for the expenses associated with the cost study that Washington supplied to NECA in 1991, or for consultants' expenses associated with Washington's petition for waiver.

5. ACCORDINGLY, IT IS ORDERED THAT the petition IS GRANTED.

6. IT IS FURTHER ORDERED THAT NECA shall adjust Washington's settlements in accordance with the statements contained in paragraphs 3-4, *supra*.

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[1] 47 C.F.R. § 69.605(c)(1991).

[2] MTS/WATS Market Structure, Report and Order, 103 FCC 2d 1017, 1026 (1986). This interpretation is administered by the National Exchange Carrier Association, Inc. ("NECA") through a process that includes the periodic issuance, to exchange carriers, of written pool administration procedures. Section 3.9 of NECA's Pool Administration Manual states, in relevant part: "[A]n Average Schedule Company can convert to actual cost based settlements on a prospective basis as long as certain data requirements are met. Once an average schedule company converts to cost based settlements it will not be able to revert back to average schedule status, without a waiver from the FCC." NECA Pool Administration Procedures: Average Schedule Company (July, 1991) at 3.9. This procedure has been used by NECA since 1986. *See, e.g.*, MTS and WATS Market Structure: Average Schedule Companies, Memorandum Opinion and Order, 3 FCC Rcd 834, 840, 842 n.88 (1986) and references cited therein.

[3] Washington County Rural Telephone Cooperative Petition for Waiver, dated July 24, 1992; filed August 3, 1992 (hereinafter, "petition").

[4] NECA Comments (Oct. 13, 1992) at 2; Letter from R. Askoff, NECA Attorney, to D. Searcy, Secretary, FCC (dated Nov. 19, 1992).

[5] NECA Comments at 2.

[6] Petition at 3, 5. As an average schedule company, Washington could not qualify for USF payments. *Id.* at 3. Its consultant estimated that Washington would receive $48,000 in USF payments in 1991, and approximately $65,000 in USF payments in 1992, if it converted to cost. *Id.*

[7] *Id.* at 3-4.

[8] *Id.* at 1. Washington also states "no actual cost studies have ever been completed," and that it should not be forced "to incur the continuing expense and administrative burden of performing detailed and time consuming cost studies, given that its decision to convert to cost initially was based on a flawed estimate." *Id.* at 5.

[9] NECA Comments at 3. No party other than NECA filed comments.

[10] *Id.* at 2.

[11] *Id.*

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program Planning Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company and New England Telephone and Telegraph Company — **CC Docket No. 90-623**

Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements — **CC Docket No. 88-2, Phase I**

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1992; Released: December 16, 1992

By the Chief, Common Carrier Bureau:

1. On August 17, 1992, the New York Telephone Company and the New England Telephone and Telegraph Company (NYNEX) filed with the Commission a petition for structural relief, pursuant to the *BOC Safeguards Order*,[1] and an explanation of why it had not met Open Network Architecture (ONA) state tariffing requirements for certain services in certain states. We find that NYNEX has adequately demonstrated that a waiver of the state tariffing requirement is appropriate for each of the ONA services in the particular states it identifies. We also find, in view of our grant of this waiver, that NYNEX has made the requisite showing for a grant of its petition for structural relief. Accordingly, we grant NYNEX's petition.

2. In the *BOC Safeguards Order*, the Commission concluded that Bell Operating Company (BOC) provision of enhanced services pursuant to nonstructural safeguards would serve the public interest, and established conditions for the removal of the structural separation requirement for BOC provision of enhanced services. Once a BOC concludes that it has met the requirements for structural separation, it must demonstrate that it: 1) has federal tariffs in effect for each of its initial interstate ONA services; 2) is technically prepared to offer each of its initial ONA services; and 3) has filed state tariffs for each of its initial ONA intrastate services.[2]

3. In its petition, NYNEX certifies that, with the exception of particular services for which it has not filed state tariffs in certain states, it has taken all of the steps specified for initial ONA implementation. It therefore petitions the Commission for removal of the structural separation requirement.[3] NYNEX claims that, due to the lack of requisite general market demand, a few services in some state jurisdictions are available only on a special assembly/individual case basis (ICB).[4] NYNEX certifies that any customer in any of the states in its region can request any of these services, although some of the services may be offered through an ICB arrangement depending on location.[5] NYNEX also claims that two services described in its ONA Plan, Customer Control of Call Forwarding and Remote Access to Call Forwarding Variable, are technically infeasible, and that it will introduce a replacement service, Universal Feature Control, to be tariffed in New York during the third quarter of 1993 and in Massachusetts by the first quarter of 1994.[6]

4. MCI opposes NYNEX's petition and argues that the Commission should not grant structural relief while relying partly on the federal tariffs NYNEX filed for initial ONA services, because the federal tariffs do not properly implement ONA goals.[7] MCI also argues that the BOCs have not made progress in implementing ONA.[8]

5. The Newspaper Association of America (NAA) also opposes NYNEX's petition, and it argues that the three prerequisites to a grant of structural relief ignore the likely competitive harm from entry by the BOCs into the enhanced services marketplace on an integrated basis. Therefore, NAA argues, the Commission should not grant structural relief until the BOCs are prevented from exploiting their local exchange monopoly in the enhanced services marketplace.[9] NAA further argues that the

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[1] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[2] *BOC Safeguards Order*, 6 FCC Rcd at 7624-7625 n.212.

[3] NYNEX Petition at 1-2.

[4] *Id.* at 2-3, n.5. NYNEX declares that because there is no demand for Circuit Switched Trunk in New Hampshire, Rhode Island, Vermont, and Maine, the service will be available as an ICB offering in those states. NYNEX further declares that in those jurisdictions where Circuit Switched Trunk is not generally tariffed, optional features associated with that service, Automatic Number Identification, Alternate Routing, and Carrier Bill for Enhanced Services Providers, are also available only as ICB offerings. NYNEX asserts that it expects to file its tariff for Information Delivery Service (IDS) in New Hampshire by mid-1993, assuming that the New Hampshire Public Utilities Commission (NHPUC) acts favorably on New England Telephone's request for a waiver of some of the state pay-per-call rules for intrastate offerings. NYNEX also asserts that the IDS service is available in Vermont as an ICB offering due to a lack of demand. NYNEX indicates that it will offer DOVPATH (DVM) as an ICB offering in New Hampshire, Vermont, and Maine because of a lack of sufficient demand to warrant general tariffing. NYNEX declares that there is no demand for PULSENET ATS in New Hampshire and Vermont, the two states where the service is available as an ICB offering. Letter from Susanne Guyer, NYNEX to Donna Searcy, FCC, September 25, 1992. NYNEX asserts that Dialed Number Identification Service on 800 and Trunk Group Make Busy are available as ICB offerings throughout its region because there is no demand for either service in any of the states. Letter from Susanne Guyer, NYNEX to Donna Searcy, FCC, November 24, 1992.

[5] *Id.*

[6] *Id.* at 2, n.4; Letter from Susanne Guyer, NYNEX to Donna Searcy, FCC, November 24, 1993.

[7] MCI Comments at 1-2.

[8] MCI Comments at 5-9.

[9] NAA Comments at 1-2.

Commission should refrain from granting the petition until the *BOC Safeguards Order* and the *BOC ONA Amendment Order* is reviewed by the courts.[10]

6. We conclude that NYNEX has adequately demonstrated that a waiver is appropriate for the particular intrastate ONA services in the states it identifies, provided that NYNEX complies with the conditions to which it stipulated in its filing.[11] We also require that NYNEX clearly indicate in its state tariffs those intrastate ONA services available through ICB arrangements and that it file general tariffs for these services as soon as there is sufficient demand. With these conditions, we grant NYNEX a limited waiver of the state tariffing requirement of the *BOC Safeguards Order*.

7. None of the commenters in this proceeding has set forth any new substantive reason why NYNEX's petition should not be granted. Instead, the two commenters disagree with Commission policy on nonstructural safeguards and the effective implementation of ONA. In the *BOC Safeguards Order*, the *BOC ONA* proceeding, and the *Part 69/ONA Order*, the Commission addressed arguments about the appropriateness of lifting the structural separation requirement, the role of state tariffs in the ONA process, and the pricing of interstate ONA services.[12] This order merely implements the Commission's decision to substitute nonstructural safeguards for structural separation; it is not the proper forum for parties to reargue the merits of that Commission decision.

8. We therefore consider whether, in view of our grant of a waiver of the state tariffing requirement for several intrastate ONA services in certain states, NYNEX has made the requisite showing for structural relief. We conclude that it has. First, NYNEX certifies that it is technically prepared to offer each of its initial ONA services consistent with its ONA plan.[13] Second, NYNEX certifies that it has effective federal tariffs for these services. Finally, with our grant of a waiver, NYNEX has satisfied the requirement that it file state tariffs for its initial ONA services. In addition, we see no reason to take the unusual step of delaying our grant of NYNEX's petition, as suggested by NAA, until the courts have reviewed the *BOC Safeguards Order*. Accordingly, we grant NYNEX's petition.

9. NYNEX must continue to comply with the BOC ONA plan and reporting requirements established in the *BOC Safeguards* and *ONA* proceedings. In the *BOC ONA Further Amendment Order* the Commission required that the BOCs file further amendments and annual reports on their progress in implementing ONA.[14] In addition, in the *BOC Safeguards Order*, the Commission stated that it would review nonstructural safeguards after all of the BOCs have operated under a full ONA environment for three years.[15] We grant NYNEX's petition subject to these ongoing ONA requirements.

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[10] *Id.* at 4-7.

[11] *See supra* para. 3.

[12] *BOC Safeguards Order*, 6 FCC Rcd at 29-30, 44-55; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 162-171 (1988) (*BOC ONA Order*), *modified on reconsideration*, 5 FCC Rcd 3084 (1990) (*ONA Reconsideration Order*), 5 FCC Rcd 3103, 3112-3113 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending, California v. FCC* No. 90-70336 (9th Cir. filed July 5, 1990; 6 FCC Rcd 7646, 7663-7664 (1991) (*BOC ONA Further Amendment Order*), *pet. for rev. pending, MCI Telecommunications Corp. v. FCC* No. 92-70189, (9th Cir. filed Feb. 19, 1992); Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524 (1991) (*Part 69/ONA Order*), *pets. for recon. pending*.

[13] In the *Federal Tariff Waiver Orders*, we granted NYNEX a waiver of the federal tariffing requirement for: 1) Custom Calling Services, including Remote Call Forwarding, because these services are classified as Complementary Network Services (CNSs) for which federal tariffing is not required; 2) T1 Transport (trunk and line side) and Tandem Routing, pending the outcome of the Transport proceeding; and 3) Monthly Detailed Recording, which NYNEX claimed is a detariffed billing and collection service. We also granted NYNEX a temporary waiver to refrain from tariffing two services, Direct Inward Dialing (DID) and DNIS on 800, until February 1, 1993 to give NYNEX an opportunity to develop methods, procedures, costs, pricing, and billing capabilities for these services. We likewise granted NYNEX a temporary waiver to delay tariffing Trunk Group Make Busy and Pulsenet until December 1, 1992 to enable NYNEX to work with its switch manufacturers to ready the services for interstate use and file any Part 69 waivers necessary to tariffing the services. *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for ONA; Filing and Review of ONA Plans*, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811 (1992); Memorandum Opinion and Order on Reconsideration, CC Docket Nos. 89-79 and 88-2, DA 92-1477 (released October 26, 1992) (*Federal Tariff Waiver Orders*. NYNEX filed the federal tariffs for Pulsenet on August 3, 1992 and for Trunk Group Make Busy on December 1, 1992. NYNEX Petition at 2, n.3; NYNEX Tariff Transmittal No. 140 (December 1, 1992). NYNEX asserts that it will file T1 Transport and Tandem Routing services as part of the federal tariff to implement the provisions of the Order adopted in the Transport proceeding. *Transport Rate Structure and Pricing; Petition for Waiver of the Transport Rules filed by GTE*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket 91-213, FCC 92-442 (released October 16, 1992). NYNEX further asserts that the T1 Transport and Tandem Routing will be available in the intrastate jurisdictions with intrastate Trunk arrangements. Letter from Susanne Guyer, NYNEX to Donna Searcy, FCC, November 24, 1992.

NYNEX has also informed the Commission that it is offering the Trunk Group Measurement Reports as an unbundled nonchargeable option in its tariff. Letter from Susanne Guyer, NYNEX to Donna Searcy, FCC, October 23, 1992. We conclude that NYNEX may offer the Trunk Group Measurement Reports as an unbundled non-chargeable option. NYNEX must revise its tariff if it charges for this service on an ongoing basis, and if NYNEX decides not to offer the service, it must seek a waiver.

The Common Carrier Bureau has approved NYNEX's withdrawal of its INFO-LOOK public network gateway. *Filing and Review of ONA Plans*, Memorandum Opinion and Order, CC Docket No. 88-2, 7 FCC Rcd 4676.

[14] *BOC ONA Further Amendment Order*, 6 FCC Rcd at 7649-7650, Appendix B.

[15] *BOC Safeguards Order*, 6 FCC Rcd at 7625.

10. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, a waiver for NYNEX of the initial state tariffing requirement for intrastate ONA services in certain states IS GRANTED.

11. IT IS FURTHER ORDERED, that NYNEX's Petition for Removal of the Structural Separation Requirement IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Communications Fund, Inc. File No. BRH-890906UA

For Renewal of License of
Station KRJY(FM)
St. Louis, Missouri

Columbia FM, Inc. File No. BRH-891002XK

For Renewal of License of
Station KARO(FM)
Columbia, Missouri

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: December 15, 1992; Released: December 16, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications from the above-listed radio stations in Missouri; (ii) a timely filed Petition to Deny by the Missouri State Conference of Branches of the National Association for the Advancement of Colored People and its various local branches (collectively "NAACP") against the license renewal applications of two Missouri radio stations;[1] (iii) oppositions filed by the licensees; and (iv) the licensees' responses to staff letters of inquiry.

II. BACKGROUND

2. NAACP alleges that the challenged stations violated the Commission's Equal Employment Opportunity (EEO) Rule and policies. Accordingly, it requests that the Commission conduct an investigation of the stations' employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) and designate the renewal applications for hearing. The licensees argue that NAACP's petition should be denied and that their renewal applications should be granted without a hearing. For the reasons discussed below, we deny NAACP's pleading and grant the stations' licenses with remedies and sanctions as appropriate.

III. PLEADINGS

3. *Standing.* The licensee of Station KRJY(FM) moves for dismissal of NAACP's challenge against it. Specifically, the licensee states that the NAACP does not have standing because it no longer has a declaration under penalty of perjury from a member who resides in the station's service area or a listener of the station. In challenging an application pursuant to Section 309(d)(1) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1). *See also Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegation, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

4. We note that the NAACP pleading originally included a statement under penalty of perjury from the President of the St. Louis Branch of the NAACP regarding station KRJY(FM). However, on January 27, 1992, and February 20, 1992, respectively, the current president of the branch and the former president who originally signed the branch's affidavit submitted notices of the branch's withdrawal from this proceeding. In addition, both NAACP presidents and the licensee submitted properly sworn declarations of no consideration pursuant to 47 C.F.R. Section 73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989). We find that approval of the St. Louis Branch's withdrawal serves the public interest. Accordingly, the petition is dismissed.

5. We note that NAACP filed two other declarations under penalty of perjury with the petition: the President of the Missouri State Conference of Branches of the NAACP regarding all Missouri stations included in the petition and the Columbia Branch President of the NAACP concerning KARO(FM) in Columbia, Missouri. The Commission has held previously that the statement of a person who does not claim to be a listener of the challenged stations or a resident of its service area, does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Applications of KDEN Broadcasting Co. for Renewal of License of Stations KDEN, Denver, Colorado*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we find that the declaration of the President of the Missouri State Conference of Branches of the NAACP who does not claim to be a resident or listener of any of the challenged stations, does not establish standing. However, the declaration from the President of the Columbia branch does meet the requirement for establishing standing for the designated branch

[1] NAACP also challenged the renewal applications of Stations KFUO/KFUO-FM. These stations will be reviewed in a subsequent order.

and for the Missouri State Conference of Branches of the NAACP regarding station KARO(FM). *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). We find, therefore, that the challenge filed by the Missouri State Conference of Branches of the NAACP constitutes a valid petition to deny against KARO(FM). Because there is no declaration under penalty of perjury regarding KRJY(FM), we find that the Missouri State Conference of Branches of the NAACP no longer has party-in-interest standing regarding this station. Accordingly, we will treat its pleading as an informal objection concerning this station.[2] *See* 47 C.F.R. Section 73.3584.

6. *Prima Facie*. NAACP derived its factual allegations from the licensees' EEO programs and annual employment reports. Review of each licensee's EEO record led us initially to conclude that NAACP presented a *prima facie* case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1); *Astroline, supra*.[3] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual, supra*.

7. However, subsequent review of NAACP's EEO allegations as well as each licensee's renewal application, opposition and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensees engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra*. Accordingly, we will grant renewal, but with appropriate remedies and sanctions.

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R Sections 73.2080(b), 73.2080(c).

9. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra*.

KRJY(FM), St. Louis

10. The licensee's 1989 EEO Program Report, opposition and inquiry responses reveal that it filled 28 full-time vacancies, including 16 for upper-level positions, during the period October 1, 1986, to August 1, 1989. Affirmative recruitment efforts were made for 13 of the 28 vacancies. Forty-four Black referrals were received from the following recruitment sources: *St. Louis Post Dispatch* (31), Job Service (six), St. Louis Community College (three), Broadcast Center (one), Hickey School (one), Meremec Community College (one) and Jobs Partnership (one). Other sources contacted for the 13 vacancies include: Career Force; Job Search, a minority-oriented state agency; United Minority Media; Image, Inc., a Hispanic organization; NAACP; Productive Futures; Division 10 Personnel; University of Missouri at St. Louis; and Maryville College. For 14 of the remaining 15 positions, the licensee relied on employee referrals (one Black candidate) former employees (one Black candidate), walk-ins (two Black applicants), the station's internship program (one Black applicant), personal contacts, the "St. Louis media community" and an advertising agency. In addition, it hired an employee from another radio station. Thus, 49 Blacks were among 107 applicants interviewed for the 28 full-time positions overall and 23 Blacks were among 58 applicants interviewed for upper-level positions. Blacks were considered for 15 full-time vacancies overall, including eight upper-level positions. The licensee hired eight Blacks, including four for upper-level positions.[4]

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[2] Although the licensee states in its motion that counsel for NAACP does not oppose its request for dismissal, counsel has not informed the Commission of this fact. Indeed, the last communication from counsel for NAACP on this issue was that the Missouri State Conference of Branches of the NAACP would not withdraw its challenge against KRJY(FM). In light of these circumstances, we find it appropriate to dismiss the petition to deny and evaluate the challenge as an informal objection.

[3] As is our practice in all cases, we reviewed the licensees' EEO efforts toward both women and minorities. We find each licensee's record of recruiting women sufficient.

[4] The St. Louis, MO MSA, in which the station is located, includes a 15.6% minority labor force (14.1% Black, 0.8% Hispanic, 0.5% Asian/Pacific Islander, 0.2% American Indian). The 1983 and 1984 Annual Employment Reports listed three Black (14.3%) and two Blacks (9.5%), respectively, among 21 full-time employees overall and one Black (6.7%) among 15 upper-level job employees, respectively. In the 1985 report, three Blacks (12.0%) were listed among 25 full-time employees overall, including one Black (5.9%) among 17 upper-level job employees. The 1986 report listed three Blacks (13.6%) among 22 full-time employees overall, including two Blacks (11.8%) among 17 upper-level job employees. In the 1987, 1988 and 1989 reports, three Blacks (12.0%) were listed among 20, 23 and 25 full-time employees, respectively, while one Black (5.9%) was listed among 16, 17 and 17 upper-level job employees, respectively.

11. NAACP acknowledges that, on paper, the licensee's EEO program is "adequate in demonstrating the productive use of recruitment sources." However, it argues that, in practice, the program is deficient in light of the station's failure to hire and employ more than a token number of minorities as evidenced by its failure to meet the processing guidelines in every year but one during the license term. NAACP also argues that the licensee has failed to assess its program in light of its inability to meet the Commission's processing guidelines.

12. In opposition, the licensee states that NAACP's charges of no self-assessment lack merit in light of an absence of a significant statistical disparity at the station. It notes that throughout the seven-year license term, it has always employed at least two minorities, including one in an upper-level position. Moreover, the licensee states that, despite an unwillingness of some applicants to relocate to St. Louis and a change in format in 1987, it has an impressive record of attracting minority applicants. It asserts that it uses a number of productive referral sources and that it interviews all applicants referred by colleges and minority organizations. The licensee states that it did not engage in recruitment efforts for 14 full-time[5] positions, mostly because of a need to "hire individuals familiar with the station who could work effectively immediately." Nonetheless, it states that four of the 14 employees hired without active recruitment were Black.[6]

13. Upon analysis of the licensee's opposition and inquiry responses, we conclude that there are no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* Because it attracted, hired and employed minorities for full-time positions, we find no evidence of employment discrimination. The licensee contacted a number of recruitment sources, received Black referrals, interviewed Black applicants and hired Blacks for full-time vacancies. We, therefore, find that the licensee generally complied with our EEO Rule and that unconditional grant of its renewal application would serve the public interest.

14. We note, however, that the licensee did not engage in affirmative recruitment efforts for 15 of its 28 vacancies. While the filling of most of these vacancies does not justify forgoing all affirmative recruitment efforts, we acknowledge that Blacks were hired for five of these 15 positions. We thus admonish the licensee to contact outside recruitment sources for every vacancy.

KARO(FM), Columbia

15. The station's 1989 EEO Program Report, opposition and inquiry responses reveal that it had 16 full-time hiring opportunities, including 15 for upper-level positions during the period September 16, 1986, to January 31, 1990.[7] In its renewal application, the licensee reports that during the 12-month period prior to filing its renewal application, *i.e.* the reporting year, minority referrals were received from the University of Missouri at Columbia (one), employees (two), *Columbia Tribune* (two) and Missouri Division of Employment Security (one). The licensee acknowledges that ten full-time hiring opportunities "were not fully competitive recruitment efforts where the stations sought out the fullest range of applicants."[8] Regarding these 10 vacancies, the licensee relied on various departments within the University of Missouri, employee referrals and applications on file (three vacancies) and used employee referrals, applications on file, a consultant, and solicited applicants (seven vacancies) which produced one minority applicant. For another vacancy filled after the reporting year but before the license term expired, the licensee relied solely on a referral by the station's sales manager. One minority among 59 applicants was interviewed for the 11 vacancies. The licensee hired no minorities for any of these positions.

16. For the remaining five vacancies, the licensee used Media Line, Stephens College, Columbia School of Broadcasting, *Radio & Records*, departments within the University of Missouri, *Columbia Tribune* and walk-ins/applications on file for one vacancy; *Columbia Tribune*, the University of Missouri, mail-in/walk-in resume file and employee referrals for two vacancies; and *Columbia Tribune*, *Columbia Missourian*, employee referrals and applications on file for one vacancy. For another position filled after the close of the reporting year but before the license term expired, the licensee contacted the University of Missouri, Stephens College, *Columbia Tribune*, employee referrals and its mail-in/walk-in resume file.[9] Out of 119 applicants, six minorities were interviewed for two of the above-referenced five full-time positions, including three minorities for one upper-level position. An Hispanic[10] clerical worker was the only minority hired for a full-time position during the period under review.[11]

17. NAACP notes that the station's annual employment reports list no minorities in any reporting year, except

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[5] The licensee does not include in this number a position for which it engaged in no outside recruitment but hired a Black female from its internship program.

[6] However, again see note 5, *supra*.

[7] In its third inquiry response, the licensee provided hiring information for positions filled after the license term expired on February 1, 1990. Consideration of post-term information would be inappropriate in this case. The licensee offers no evidence that its post-term recruitment efforts are an outgrowth of efforts made during the license term. *See Rust Communications Group, Inc.*, 73 FCC 2d 39 (1979).

[8] The licensee notes that five vacancies were filled with employee referrals while five other vacancies were filled by persons who approached the station (*i.e.* applications on file, walk-ins) or who were hired from competing stations.

[9] We note that successful applicants for these positions came from walk-ins (one), *Columbia Tribune* (two, including the successful minority applicant) and employee referrals (one) and employee referral/resume file (one).

[10] In its 1989 Annual Employment Report, the licensee listed this employee as an Hispanic based on her Hispanic surname. However, in response to NAACP's petition and our first inquiry regarding its recruitment efforts towards Blacks, it stated that this employee is also of Black origin. Section 9a of the "Instructions For Completion of FCC Form 395-B Broadcast Station Annual Employment Report" states an employee may be included in "the minority group to which she or he appears to belong, or is regarded in the community as belonging." Regarding persons of mixed racial and/or ethnic backgrounds, Section 9d states that the "category which most closely reflects the individual's recognition in his community should be used ...."

[11] The Columbia, MO MSA, in which the station is located, has an 8.2% minority labor force (5.8% Black, 1.0% Hispanic, 1.1% Asian/Pacific Islander, 0.3% American Indian). No minorities were reported among full-time employees on any of the station's Annual Employment Reports for years 1984 (10 full-time employees), 1985 (11 full-time), 1986 (13 full-time), 1987 (16 full-time), or 1988 (17 full-time). Its 1989 report listed one Hispanic among 18 full-time employees overall (5.6%) and no minorities among 17 upper-level job employees.

1989 when an Hispanic[12] was listed as a full-time clerical worker. In addition, it states that it is unclear what methods were taken to maintain communication with the recruitment sources listed in the renewal application. It notes that neither its local chapter nor Lincoln University's Placement Office, which are listed on the renewal application, has any record of requests for referrals from KARO(FM).[13]

18. In its opposition, the licensee argues that it has engaged in good faith efforts to recruit and hire qualified minority employees. It notes that its Hispanic employee is of mixed Black and Hispanic heritage and thus, when considered as a Black for purposes of responding to the EEO program, puts the station's employment near parity with Columbia's Black labor force. The licensee also notes that it never has had an employment discrimination complaint filed against it and that it has hired Blacks on a level well in excess of Columbia's Black labor force.[14] In addition, it states that two Blacks participated in its internship program and that a Black sales intern was offered and declined a full-time position with the station. The licensee argues that its difficulty recruiting Blacks and other minorities is due to the small minority labor force, competition from other stations in the area and in larger nearby markets for minority applicants,[15] the unavailability of interested minority students from local colleges, the station's small size andits relatively stable workforce.[16] In addition, the licensee argues that its efforts to employ minorities during the license term should be evaluated in light of the fact that for much of the term, the Commission was suggesting to licensees that a 50% of parity standard was sufficient to assume EEO compliance and that the "new" EEO requirements were not enunciated until 1987. In this regard, it notes that from 1983 to 1986, it had 13 or fewer full-time employees. Thus, it argues that its failure to list a Black employee is "hardly surprising" and that only in the past two or three years, with its full-time staff approaching a reasonably sufficient size to expect Black recruitment efforts to realistically impact its workforce percentages, can the station be appropriately judged on the effectiveness of its EEO program.[17] Nonetheless, the licensee acknowledges that it "has relied too heavily on special situations, as well as upon employee referrals, and upon walk-in hiring situations, to fulfill immediately arising hiring needs"[18] and that it will "make specific contact upon *every* hiring opportunity (even when particularly qualified individuals are otherwise known to be available) with the referral sources listed in its EEO Program."

19. Upon analysis of the licensee's EEO record, we conclude that no substantial and material questions of fact remain warranting designation for hearing. *Astroline, supra.* We find no evidence that the licensee engaged in employment discrimination and note that it in fact hired minorities. We do, however, find that the licensee failed to make sufficient efforts to attract minorities and that this behavior occurred throughout the review period. We will, therefore, grant renewal subject to reporting conditions and issue a Notice of Apparent Liability for $4,000.

20. The licensee acknowledges that it did not actively recruit for most of its 16 vacancies. It contacted general recruitment sources for no more than eight of the 16 vacancies. It also attracted a total of seven minority applicants. Six minorities were attracted for two of the eight positions for which it contacted general sources. The seventh minority attracted was for one of the eight positions that was not subject to general recruitment. Further, we are concerned that the licensee apparently waited until the reporting year to engage in any self-assessment of its program, notwithstanding its previous lack of success in minority recruiting. *See* paragraph 16. Indeed, it apparently was unaware that it lacked documentation indicating con-

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[12] Hispanics are not represented in significant numbers in Columbia.

[13] In addition to NAACP and Lincoln University, other sources listed in the renewal application but not in the first inquiry response for specific vacancies include: League of Women Voters, UMC Womens' Center and Missouri Division of Employment Security. In response to our second inquiry on this issue, the licensee explained that in completing its EEO Program Report, it relied on summary records which indicated that no referrals were received from these sources, but did not reveal when these sources were contacted. Although it states that it contacted these sources orally for most vacancies, it states that in preparing the first inquiry response, it discovered that it "was unable to document these oral contacts and to determine for precisely which job openings such oral contacts were made," and consequently, they were not "ident[ified] as having been contacted for a particular job opening in the first response." Regarding Lincoln University, it states that due to a lack of success receiving referrals in the early 1980's and because of the geographical distance from the school, efforts with this source were curtailed. However, it states that it "endeavored to keep the lines of communication open," because it had an application pending before the Commission to expand its signal over Jefferson City where Lincoln is located. With respect to Missouri Division of Employment Security, it states that this source was contacted orally when an office/clerical position became available. The licensee states that, in the future, it will make specific contact with all these sources, in writing.

[14] This assessment is based on the station's part-time hires and its double counting of a full-time employee with a racially mixed background.

[15] Comparing its number of minority hires to other stations in Columbia, the licensee states that it has shown significant progress in the hiring of minorities. We remind the licensee that our primary focus is on a station's overall efforts and that the fact that a station has hired one minority, in and of itself, does not mean that it has an effective EEO program.

[16] We reject these arguments. Competition from other stations, the station's small size and stable workforce are factors which would affect a licensee's ability to attract all applicants, minority and non-minority alike. Regarding the unavailability of interested minority students at local schools, we remind the licensee that when a station finds that it is not attracting a sufficient pool of minorities from its referral sources, it is expected to try new sources.

[17] This argument also lacks merit. Our EEO Rule, which has been in effect throughout the license term, has required licensees to refrain from employment discrimination and to establish and maintain an affirmative action program for qualified minorities and women since 1970. *See Nondiscrimination Employment Practices of Broadcast Licensees,* 23 FCC 2d 430 (1970). The changes in the rule made in *Broadcast EEO* in 1987 did not alter the basic requirements of the then existing EEO Rule. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services,* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters).

[18] "Special situations" are defined as "when a particularly sought-after and experienced individual working for a competitive station is available for hiring at KARO(FM)...."

tacts with some of the sources listed in its renewal application until after the license term expired and it was preparing its first inquiry response.

21. This case is similar to, but more egregious than, Stations WVNA(AM)/WVNA-FM, *Applications of Renewal of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia*, 6 FCC Rcd 5968 (1991), in which we granted renewal subject to reporting conditions and issued a Notice of Apparent Liability for forfeiture in the amount of $3,000. In that case, the licensee recruited for only six of 13 vacancies, attracted minorities for three positions[19] and hired one minority for a lower-level position. Despite this record, the licensee did not meaningfully assess its EEO program.

22. Similarly, station KARO(FM) recruited for eight vacancies, attracted minorities for three applicant pools, hired one minority for a lower-level position and did not meaningfully self-assess its EEO program. However, KARO(FM) is more serious in two respects. First, KARO(FM) had 16 full-time vacancies and, therefore, it had more hiring opportunities for which to recruit. Second, unlike WVNA/WVNA-FM which reported minority full-time employment throughout most of the license term, KARO(FM) reported minority full-time employment only in the last year of the license term. Accordingly, we find that imposition of reporting conditions and a forfeiture in the amount of $4,000 is appropriate in this case.

V. CONCLUSION

23. After reviewing the evidence and arguments submitted by NAACP and the licensees in the instant case, we find no hearings are warranted and the records of the licensees support the granting of all of their renewal applications. With respect to Station KRJY(FM), we admonish the licensee to contact sources for every vacancy. Because of repeated failures to comply with our EEO Rule during the previous license term and concerns regarding future compliance, renewal subject to reporting conditions and a Notice of Apparent Liability for Forfeiture in the amount of $4,000 are warranted for Station KARO(FM).

VI. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, that the petition to deny filed by NAACP against Station KRJY(FM) IS DISMISSED.

25. IT IS FURTHER ORDERED, that the informal objection filed by NAACP against Station KRJY(FM) IS DENIED.

26. IT IS FURTHER ORDERED, that the petition to deny filed by NAACP against Station KARO(FM) IS DENIED.

27. IT IS FURTHER ORDERED, that the renewal application filed by Communications Fund, Inc. for Station KRJY(FM) IS GRANTED.

28. IT IS FURTHER ORDERED, that the renewal application filed by Columbia FM, Inc. for Station KARO(FM) IS GRANTED subject to the reporting conditions specified herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $4,000.

29. IT IS FURTHER ORDERED, that the licensee of Station KARO(FM) submit to the Commission an original and one copy of the following information on October 1, 1993, October 1, 1994 and October 1, 1995:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective: reporting dates, indicating the job title; job classification and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. This list should also noted which recruitment sources were contacted;[20]

(b) A list of employees as of the September 1st payroll period for each annual report by job title, indicating full-time or part-time status ranked from highest paid classification, date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

30. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings for KARO(FM) the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to its ability to pay should include those financial letters set forth in the noted attachment.

31. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[19] WVNA/WVNA-FM submitted applicant pool data for 10 jobs.

[20] Such a list might start: (1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP. Selected: Black male (03/15/92)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-263

In the Matter of

Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992
Consumer Protection and Customer Service

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992; Released: December 11, 1992

Comment Date: January 11, 1993
Reply Comment Date: January 26, 1993

By the Commission:

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992", "Cable Act", or "Act").[1] Under Section 8 of this Act, *inter alia*, the Commission must prescribe standards governing cable customer service within 180 days after enactment, *i.e.*, by April 3, 1993. Such standards shall address, at a minimum, cable system office hours, telephone availability, installations, outages, service calls, and communications between the cable operator and subscriber, including billing and refunds. The Cable Act does not provide the Commission independent enforcement authority over these standards. Rather, it allows a State or local government authority to adopt and enforce either the Federal standards or more extensive customer service standards. By this Notice of Proposed Rule Making ("NPRM"), we seek comment on the adoption and implementation of this section.

II. BACKGROUND

2. Prior to the new Cable Act, local governments were permitted to enforce customer service requirements[2] Despite this ability, Congress has found continued and widespread customer dissatisfaction with many operators, *e.g.*, phones are not answered promptly, offices are open for a minimal number of hours, and service calls take too long.[3] In response to earlier demand for improved customer service, in February 1990 the National Cable Television Association ("NCTA") adopted "Recommended Industry Customer Service Standards." These standards, according to the NCTA, provide each community and cable system "reasonable flexibility" in implementation, and address such matters as telephone response time, office hours, installation, outages and service calls, rate changes, channel repositioning, and billing and refunds.[4] The NCTA standards are voluntary, however, and cannot be enforced by the industry due to antitrust law, or by a franchising authority, unless such provisions are specifically included in the franchising agreement.[5] The Congress, although commending the industry for taking steps to improve the quality of customer service, still regards customer service as "an area of paramount concern[6] and questions the extent to which cable systems are complying with voluntary standards.[7] Accordingly, Congress enacted customer service provisions as part of the Cable Act of 1992.

3. Section 8 of the Cable Act, entitled "Consumer Protection and Customer Service", amends section 632 of the Communications Act of 1934 (47 U.S.C. 552) as follows:

> (a) FRANCHISING AUTHORITY ENFORCEMENT.- A franchising authority may establish and enforce-
>
> "(1) customer service requirements of the cable operator and
>
> "(2) construction schedules and other construction-related performance requirements, including construction-related performance requirements, of the cable operator.
>
> "(b) COMMISSION STANDARDS.-The Commission shall, within 180 days of enactment of the Cable Television Consumer Protection and Competition Act of 1992, establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing-
>
> "(1) cable system office hours and telephone availability;
>
> "(2) installations, outages, and service calls; and

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[1] Publ. L. No. 102-385, 106 Stat. 1460 (1992) (For ease of reference, citations herein are made to the Communications Act of 1934, as amended by the Cable Act of 1992).

[2] Pub. L. No. 98-549 Section 632, 98 Stat. 2780 (1984).

[3] Senate Comm. on Commerce, Science and Transportation, S. Conf. Rep. No. 102-92, 102d Cong., 2d Sess. at 20 (1991).

[4] Testimony of James P. Mooney, President and Chief Executive Officer, National Cable Television Association, Legislative hearing of the House Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce to consider pending cable legislation, March 1, 1990.

[5] *See* S. Conf. Rep. No. 102-92, *supra*, at 20.

[6] House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. at 105 (1992).

[7] *See* S. Conf. Rep. No. 102-92, *supra*, at 20-21. *See also* H.R. Rep. No. 102-628, *supra*, at 36 (concerns raised over whether a "self-policing mechanism can be successful in addressing the serious concerns of consumers about the cable industry's customer service practices").

"(3) communications between the cable operator and the subscriber (including standards governing bills and refunds).

"(c) CONSUMER PROTECTION LAWS AND CUSTOMER SERVICE AGREEMENTS.-

"(1) CONSUMER PROTECTION LAWS.-Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.

"(2) CUSTOMER SERVICE REQUIREMENT AGREEMENTS.-Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b). Nothing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

III. DISCUSSION

The Customer Service Standards Enforcement Process

4. Historically, customer service standards applicable to the cable television industry have either been established by system operators on their own or have been imposed as regulatory obligations by state or municipal governments, typically as part of the franchise process. Such standards have not been imposed or enforced by the Federal government. The customer service standards provisions of the 1992 Cable Act create a new role for the Commission in this area, mandating that we establish standards that may be adopted and enforced by State and local governments but, following the historical pattern, providing the Commission no role in the enforcement of these standards. What remains unclear is the specific mechanism whereby the Commission's standards become "service requirements" for local cable system operators.[8] How Congress intended this process to function is thus a threshold question on which we seek comment. If it is believed that the Federal standards are in some sense self-executing, without further implementing action by State or local authorities necessary, then it is particularly critical that the substance of the standards be appropriate for a broad range of types of communities and economic circumstances. If, under the statute, the Commission's standards are not self-executing, we seek comment on what actions, if any, a franchising authority must undertake in order to impose the Commission's standards, or some other standards. For example, must the franchising authority affirmatively enact the standards in order for them to be enforceable and provide, at a minimum, adequate notice to cable operators and subscribers of their enactment?

5. There are several additional questions regarding the role and impact of any Federal standards adopted. First, Section 632(a) preserves the right of a franchising authority generally to establish any customer service requirements. With respect to the customer service standards this Commission may establish, the statute provides certain qualifications. Section 632(c)(1) clearly articulates Congress' intent that local authorities retain the power to adopt consumer protection laws of general applicability, except as they may be specifically preempted by the 1992 Cable Act. It appears that Section 632(c)(2) similarly provides for State and local customer service laws and regulations of general applicability, beyond those adopted by this Commission, although they may be effectively superseded to the extent they are less stringent than the Federal standards we may establish. That subsection also provides that a franchising authority and cable operator may agree to customer service standards beyond those adopted by this Commission. It would seem, then, that local standards specific to cable operators' customer service performance, adopted by mutual agreement, could readily vary from, or at least exceed,[9] the Federal standards we establish.

6. These specific provisions do not appear to differ materially from section 632 of the Communications Act of 1934, as amended by the 1984 Cable Act.[10] However, whereas section 632(a) of the 1984 Cable Act permitted franchising authority to impose customer service requirements only as part of an initial franchise award or renewal, the new Cable Act imposes no such limitation. We seek comment on the interpretations of the individual aspects of Section 632, and the interplay between these provisions and those that we propose in the preceding paragraph.

7. We also seek comment on what impact this section of the Act has on existing franchising agreements, particularly as to whether it permits a franchising authority to modify existing franchise agreements prior to renewal. We ask parties to comment specifically on when, pursuant to the new Act, a local government may impose new customer service standards, and the extent to which existing franchis-

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[8] *See* Communications Act of 1934, Section 632(b).

[9] We seek comment on whether the Act should be read to preempt franchise authorities from adopting cable customer service standards that -- tailored to the unique needs and resources of a locality -- might fall below the Federal standards in certain respects or cumulatively. Additionally, we seek comment on whether the statute would permit the Commission to grant waivers of the Federal customer service standards and, if so, when such waivers would be required and on what basis such waivers would be justified.

[10] Section 632 of the Communications Act, as amended by the 1984 Cable Act (47 U.S.C. 552) provides: (a) A franchising authority may require, as part of a franchise (including a franchise renewal, subject to section 626), provisions for enforcement of -

(1) customer service requirements of the cable operator, and

(2) construction schedules and other construction-related requirements of the cable operator.

(b) A franchising authority may enforce any provision, contained in any franchise, relating to requirements described in paragraph (1) or (2) or subsection (a), to the extent not inconsistent with this title. Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not inconsistent with this title. Public Law No. 98-549 Section 632, 98 Stat 2780 (1984).

ing agreements can or should be grandfathered.[11] We deem it unlikely that Congress intended for there to be no changes in customer service requirements prior to the expiration of each current franchise agreement. In this regard, we seek comment on whether the Federal standards we adopt supersede all franchise agreements upon their effective date, or upon affirmative action by respective franchise authorities, as discussed in paragraph 4, above. Would such an interpretation effectively lead to pre-renewal negotiations for new mutually-developed standards where desired by a franchise authority? Is subsection (a) intended to provide authority for a franchise authority to unilaterally establish customer service standards after December 3, 1992 (the effective date of the statute) or some other fixed date, such as the effective date of any rules we establish in this proceeding? Since the Act only requires the Commission to establish Federal standards, and not enforce them,[12] we question and invite comment as to whether the Commission should have any role with regard to customer service obligations once we have established our standards.

Alternative Approaches for Federal Customer Service Standards

8. Section 8 of the Act amends section 632(b) of the Communications Act of 1934 to require the Commission to "establish standards by which cable operators may fulfill their customer service requirements." Such standards shall address, at a minimum, requirements governing office hours, telephone availability, installations, outages, service calls, and communications between the cable operator and the subscriber, including standards governing billing and refunds.[13] As discussed above, the statute and legislative history suggest that the Commission shall establish "flexible" standards, which would leave State and local governments the opportunity to impose more stringent requirements based on individual community needs.[14]

9. The Commission has previously considered implementing the customer service standards recommended by NCTA, which address each of the factors set forth in Section 632(b) of the Act.[15] In fact, the Congress has suggested that the NCTA standards may be an appropriate "benchmark" for the Federal standards to be adopted in this proceeding.[16] Nevertheless, both the legislative history and comments in our own past proceedings reflect the competing concerns that these standards, like other national standards, are unworkable, burdensome, or inadequate.[17]

10. We therefore seek comment on the customer service standards to be adopted in this proceeding. Specifically, we ask whether the NCTA's standards (or some modification thereof) may provide an appropriate Federal customer service benchmark.[18] We also seek comment on other standards, more or less stringent than NCTA's, that have been established by various cable, government and consumer groups. Parties should provide information on: 1) the extent the NCTA standards, or any other standards, may have been adopted within the industry or in conjunction with franchise agreements; and 2) the levels of cable operator compliance and customer satisfaction achieved under such standards. Parties may also comment on whether it is appropriate for local authorities to be responsible for 1) setting time frames in which to comply with standards, 2) overseeing compliance and determining how compliance should be measured, 3) establishing penalties for violations of the standards,[19] or 4) imposing specific billing and refund procedures[20] ?

11. Turning to the NCTA standards, the first area addressed relates to office and measurement of compliance by telephone availability and provides:

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[11] The Senate Committee Report on S.12 states that the Senate's customer service provision would have "grandfather[ed] any standards in existence on the date of enactment." S. Conf. Rep. No. 102-92 at 81. The Conference Committee, however, chose to adopt the House customer service provision, which is silent on this issue. *See* H.R. Conf. Rep. No. 102-862 at 79. We seek comment on whether this indicates that Congress did not intend to grandfather existing contracts, and whether Congress' goal of improving customer service can be achieved in a timely fashion if franchising authorities cannot amend existing customer service agreements prior to franchise renewal.

[12] Sections 632(a) and (c) of the Communications Act explicitly reserve enforcement authority to the States or franchising authorities.

[13] The particular aspects of customer service specified in the statute and raised here appear to address the primary complaints as evidenced in legislative history and our own experience. Given the local franchising authorities' ability to adopt additional requirements as needed, we do not believe additional Federal provisions are needed. Commenters may address this issue.

[14] *See* H.R. Rep. No. 102-628, *supra*, at 37. *See also* Communications Act, Section 632.

[15] In its effective competition proceeding, the Commission proposed using the NCTA standards as part of a proposed "good actor" or "competitive behavior" test. The Commission, however, did not adopt that test and did not specifically address the merits of the NCTA standards in the proceeding. *See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4554 (1991) (*Effective Competition*). *See also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 4991-92 (1990). (*1990 Cable Report*).

[16] *See* H.R. Rpt. No. 102-628, *supra*, at 105. ("The Committee recognizes the difficulty of establishing a uniform set of national standards that can be applied equally to all cable systems, regardless of size, and in all parts of the country, regardless of marketplace characteristics. The [NCTA's] voluntary standards, which have been adopted not only [by] the NCTA but also CATA, another trade association of cable operators, attempt to address these differences. The industry's voluntary standards represent a welcome initiative, which the Commission may use as a benchmark in establishing customer service standards."

[17] *See* H.R. Rep. No. 102-628, *supra*, at 34-37, 105-106; S. Conf. Rep. No.102-92, *supra*, at 20-22; *Effective Competition*, *supra*, at 4555.

[18] Parties commenting in this regard may also wish to revisit any issue raised with respect to the NCTA standards noted in prior Commission proceedings, *e.g.*, *Effective Competition* or *1990 Cable Report*.

[19] We seek comment on whether the new Cable Act provides enforcement authority above and beyond that which is permitted under the customer service section of the 1984 Cable Act, *e.g.*, can a franchising authority require an operator to provide a remedy for each violation, or are violations punishable only during franchise renewal by denial of the franchise?

[20] Parties are also asked to address the impact of the billing and refund provisions in this section on other relevant provisions of the Act, including, for instance, the rate rollback and refund provisions (Section 3), and the subscriber bill itemization requirement (Section 14).

A. Knowledgeable, qualified company representatives will be available to respond to customer telephone inquiries Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will staff telephones for supplemental hours on weekdays and/or weekends.

B. Under normal operating conditions, telephone answer time by a customer service representative, including wait time, and the time required to transfer the call, shall not exceed 30 seconds. Those systems which utilize automated answering and distributing equipment will limit the number of routine rings to four or fewer. Systems not utilizing automated equipment shall make every effort to answer incoming calls as promptly as the automated systems. This standard shall be met no less than ninety percent of the time measured on an annual basis.[21]

C. Under normal operating conditions, the customer will receive a busy signal less than three percent of the total time that the cable office is open for business.

D. Customer service center and bill payment locations will be open for transactions Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours on weekdays and/or weekends during which these centers will be open.

12. Difficulties that subscribers have had in communicating with their local cable systems operators, including busy telephone lines and telephone calls placed on hold for long periods, have been a clear area of consumer discontent.[22] While the foregoing standards would appear to respond to these concerns, they are directed toward communications during normal business hours. Because the highest levels of television viewing occur outside of these hours, we seek comment on how "normal operating hours", or other terms affecting service obligations, should be defined and how communications outside of normal operating hours should be addressed.

13. The second area under the NCTA standards relates to installations, outages and service calls and provides:

Under normal operating conditions, each of the following four standards will be met no less than 95% of the time measured on an annual basis:

A. Standard installations will be performed within seven business days after an order has been placed. "Standard" installations are up to 125 feet from the existing distribution system.

(The NCTA standards contemplate that systematic measurement of certain standards, *e.g.*, telephone answering time, may not be cost effective for and should not be expected of cable systems with fewer than 10,000 subscribers.) We seek comment of whether our own standards should include such an exemption for small systems and whether such an exception is within the requirements of the statute. Parties also should comment on the definition of "small cable systems."

B. Excluding those situations beyond the control of the cable operator, the cable operator will respond to service interruptions promptly and in no event later than 24 hours. Other service problems will be responded to within 36 hours during the normal work week.

C. The appointment window alternatives for installations, service calls, and other installation activities will be (a) morning, (b) afternoon, or (c) all day during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours during which appointments can be set.

D. If at any time an installer or technician is running late, an attempt to contact the customer will be made and the appointment rescheduled as necessary at a time which is convenient for the customer.

14. Within these standards arises the question of how to address installation or service calls. Subscribers that stay at home awaiting an installation or repair crew that does not appear at the scheduled time understandably feel aggrieved. This is particularly the case when the subscriber must bear the cost of being absent from work for the appointment. On the other hand, the time involved in an installation or service call may be difficult for cable system management to know in advance. Additional service crews can be hired to reduce such occurrences, but considerable expense to system operators and eventually to consumers may result. Thus, we believe that the installation and service standards must reflect a fair balance. System operators should not be imposing undue costs and inconveniences on individual subscribers, but undue costs should not be imposed on system operators (and, ultimately, customers). We seek comment on how this balance can properly be struck in the adoption of general standards and on whether there are incentives that can be included in such standards so that system operators will be motivated to function efficiently and respond promptly.

15. The third area of the NCTA standards relates to communications, bills, and refunds and provides:

A. The cable company will provide written information in each of the following areas at the time of installation and at any future time upon request:

* products and services offered
* prices and service options
* installation and service policies
* how to use the cable service

[21] The NCTA standards contemplate that systematic measurement of certain standards, *e.g.*, telephone answering time, may not be cost effective for and should not be expected of cable systems with fewer than 10,000 subscribers. For this, as for other elements of the 1992 Cable Act, various exemptions, exceptions and waiver standards are explicitly or implicitly suggested or provided, based on the size of a system. For each provision, the size of the exception should be related to the nature of the burden imposed by the particular provision. With this in mind, we seek comment on whether our own standards should include such an exemption for measurement of compliance by small systems and whether such an exception is within the requirements of the statute.

[22] *See* S. Conf. Rep. No. 102-92, *supra*, at 20.

B. Bills will be clear, concise and understandable.

C. Refund checks will be issued promptly, but no later than the earlier of 45 days or the customer's next billing cycle following the resolution of the request, and the return of the equipment supplied by the cable company if service is terminated.

D. Customers will be notified a minimum of 30 days in advance of any rate or channel change, provided the change is within the control of the cable operator.

16. These standards focus on system communications with subscribers, particularly in the context of the billing process. The objective, rather than to specify the substantive answer to a variety of billing and service controversies, is to establish clear communications between the parties. For a broad rule of general applicability this would appear to be a useful approach. However, we seek comment on whether there are issues where a more specific substantive requirement is warranted. We also seek information on customer service requirements of more general applicability that may be in force in State or local governments. These regulations, meant to apply to all manner of businesses that operate in competitive markets, may be instructive as to standards of customer service that are reasonable to expect from truly competitive businesses. We seek comment on the propriety and utility of using such regulations for guidance in setting the Federal cable standards for customer service.

17. In addition to the NCTA standards, there are several other approaches which the Commission could take in establishing Federal standards. For example, we could adopt a single standard, or adopt a series of standards based upon size or other characteristics of the cable system. Many cable operators and some franchising authorities have argued in the past that:

> no single national benchmark can take into account differences among cable system and community characteristics, including size, demographic, geographic and cost differences. In addition. . . some . . . argue that the benchmarks need to be numerous and flexible to allow comparisons among similarly situated systems.[23]

Congress also appeared to contemplate that the FCC's standards could be tailored to meet the needs of local communities.[24]

18. Accordingly, comments are invited on how a single benchmark can properly reflect the needs and concerns of each cable community in the nation, particularly where local franchising authorities and cable operators may need to retain flexibility to customize service obligations to the specific needs of a cable service area. In some service areas, for instance, even minimal service guidelines may require a level of funding that, with a limited subscriber base, might result in a dramatic increase in rates or a reduction of other services. For example, the costs of maintaining sufficient operators on hand to meet minimal telephone response guidelines may limit a cable operator's resources. This could reduce programming options or other service options which may be contrary to Congressional intent and consumer desire. Certain cable systems may be able to provide enhanced customer services through the use of a more cost-effective automated or centralized complaint and billing system, which would eliminate the need for a customer service center in every community. Smaller cable systems probably could not afford an automated system and, in any event, customers in such areas might well prefer the more personalized approach a customer service representative could provide. A single standard might not be able to address these varying circumstances. We specifically ask for comment on the costs and benefits associated with various levels of service obligations and how these differences should be addressed.

19. We also invite comment on whether different minimum service obligations would be appropriate based on the size or other characteristics of the cable system, *e.g.*, age of system, size of multiple system operator, proximity of co-owned systems, system "design", etc. Commenting parties may wish to address whether, and to what extent, we might adopt a range of service minimums within which franchise authorities and cable operators could negotiate.[25] We may consider, for instance, establishing a range for telephone responsiveness of, for example, between 30 seconds to one minute. A cable operator and franchising authority may mutually agree upon a duration within that range that is appropriate for a particular franchise area. Such an approach would be aimed at affording local authorities and cable operators the flexibility to customize appropriate levels of customer service taking into account several factors, for example, geographic conditions which might impact speed of service or "peak" demand periods. We seek comment on this approach and request parties to be specific regarding appropriate ranges that might be established. We also seek comment on what the standards should be if the franchising authority and cable operator are unable to agree on a standard within the range, *i.e.*, in the above example, the Federal standard, in the absence of an agreement, may be the midpoint (45 seconds), the more stringent standard in the range (30 seconds), or the less stringent standard (one minute). Finally, we seek comment on whether the Commission could, consistent with the Act, adopt an "escalating benchmark" approach that would reasonably increase the service minimums over time as cable operators demonstrate improvements in their customer service efforts. Such an approach would enhance service to consumers, if done in a manner that takes into account the resource differences discussed above.

20. As a final matter, in order that the standards be clearly understood and uniformly measurable and enforceable, we seek comment on whether the Commission should define in detail the meaning of any terms included in the NCTA standards or other proposals, and, if so, we request that commenting parties provide specific definitions and focus in detail on the measurement standards. For example, terms such as "normal business hours" or "service

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[23] *Effective Competition, id.*

[24] *See* H.R. Rpt. No. 102-628, *supra*, at 105 ("Overall, these standards should be flexible in nature and should allow a local franchising authority to tailor the requirements to meet the needs of the local cable community").

[25] In this regard, see the discussion in paragraphs 5 and 6 above, regarding franchise authority discretion within the provisions of the statute.

interruptions" may vary depending on the size of the system or may be influenced by circumstances beyond the control of the operator (like extreme weather conditions or power outages) as well as events within the control of a cable system (such as foreseeable seasonal or promotional peak demand periods.) We request comment on whether Federal standards should address these or other factors.

IV. ADMINISTRATIVE MATTERS

Ex Parte Rules - Non-Restricted Proceeding

21. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

Comment Information

22. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before **January 11, 1993**, and reply comments on or before **January 26, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

Regulatory Flexibility Act

23. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. Sections 601 *et seq.* (1981)).

Additional Information

24. For further information concerning this proceeding, contact Ellen Schned, Office of Legislative Affairs, at (202) 632-6405, or Alan Aronowitz, Mass Media Bureau, at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action.

This proceeding is being implemented in order to seek comment on the best way to implement section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, relating to cable consumer protection and customer service.

Objectives.

The Commission's goal is to provide notice and opportunity to comment to members of the public regarding implementation of section 8 of the new Act, which concerns Federal customer service standards for cable system operators.

Legal Basis.

Authority for this proposed rule making is contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, and section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (1992).

Reporting, Recordkeeping and other Compliance Requirements

The Commission is asking for comment concerning what Federal standards to adopt to govern cable consumer protection and customer service.

Federal Rules that Overlap, Duplicate or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The rules proposed in this proceeding could impose new burdens on cable operators, including smaller systems, if the Federal customer service standards proposed in this rule or other, more extensive standards, are enacted and enforced by State or local governments.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

Undetermined at this time. Comment is specifically sought on this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 17, 1992

CONSUMER ALERT

TOLL FRAUD RISKS DURING THE YEAR-END HOLIDAY SEASON

Third in a Series

The year-end holiday season presents an increased risk of toll fraud for telecommunications consumers. Any person or business can fall victim to toll fraud, and we urge all consumers to take exceptional precaution during the holiday season to avoid the additional risks.

RISKS AND RECOMMENDATIONS FOR INDIVIDUAL CONSUMERS.

Because of holiday-related travel, individual consumers will be making more calls from telephones in public locations, such as airports, train stations, and bus terminals. Many of these calls will be placed using calling cards issued by a local or long distance telephone company. Unauthorized people may try to obtain calling card and personal identification numbers by watching callers dial these numbers or by overhearing the numbers being read to an operator at a public pay telephone. The cards themselves may also be lost through theft or loss of a wallet or purse.

Precautions. While traveling, consumers can take a number of steps to prevent this type of fraud:

1) Use a telephone that reads your calling card number from the magnetic strip on the back of the card. If this type of telephone is unavailable, take steps to prevent others from watching you dial your card number or overhearing you give your number to an operator. In general, never give your calling card number to any unknown person.

2) Immediately report a lost or stolen calling card to the local or long distance telephone company that issued it. The company will cancel your card and issue you a new one.

3) Avoid using your telephone calling card as identification for consumer purchases or cashing checks.

RISKS AND RECOMMENDATIONS FOR BUSINESSES.

During the holiday season, when many businesses are only partially staffed because of employee vacations or holiday festivities, their telecommunications systems may be targets of fraudulent calling because the systems are not fully monitored or secured. These systems, including private branch exchange (PBX) and voice mail equipment, may, through remote access or other features, allow incoming callers to receive a new dial tone for outgoing calls. Unauthorized people may try to use the systems to place outgoing calls or arrange third-number billing. In either case, the calls would be billed to the system owner.

Precautions. Businesses can take several steps to protect their systems from toll fraud:

1) Disable or otherwise restrict the remote access, voice mail, and other features of your telecommunications system that could allow outgoing calls. Disable or restrict these features whenever they will not be in use for business purposes, especially on holidays, weekends, and at other times when employees will not need them. Consider whether these features will be required at all for business purposes during the holiday season.

2) Change the passwords and authorization codes used for remote access, voice mail, administrative, and other purposes. Unauthorized people may already have discovered your current passwords and codes and are waiting until the holiday season, when your staffing is at a low level, to use those passwords and codes for fraudulent calls. Change passwords and codes frequently throughout the year.

3) Monitor calling through your telecommunications system on a regular and frequent basis during the holiday season. Frequent monitoring is one of the best ways at any time of the year to quickly detect unauthorized calling.

4) Route incoming calls to a live operator or receptionist, if staffing permits, rather than to the automated attendant that usually answers your calls. An operator or receptionist may be able to assist in detecting unauthorized calls during this time of increased fraud risk.

5) Contact your equipment vendor, your local telephone company, and your long distance telephone company to determine what security systems are available to protect your equipment and telephone service from toll fraud, and what monitoring services are available to help you quickly detect unusual usage.

PRECAUTIONS MUST BE PERMANENT.

Unfortunately, the risk of toll fraud does not end with the conclusion of the holiday season. We advise individual consumers and businesses to take precautions even after the holidays are over. We have outlined additional toll fraud precautions in previous "Consumer Alert" Public Notices issued on April 19, 1991, and June 9, 1992. Copies can be obtained by writing to the FCC, Informal Complaints Branch, Enforcement Division, Common Carrier Bureau, 2025 M Street, N.W., Suite 6202, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

WESTERN MAINE CELLULAR, INC.
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 463
Oxford, Maine
File No. 08288-CL-MP-92

PORTLAND CELLULAR PARTNERSHIP
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 152
Portland, Maine
File Nos. 07505-CL-MP-92
07506-CL-MP-92

PARKERSBURG CELLULAR TELEPHONE CO.
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 200
Parkersburg-Marietta, Ohio-West Virginia
File No. 07526-CL-MP-92

BELL ATLANTIC MOBILE SYSTEMS, INC.
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 690
Frederick, Virginia
File No. 08286-CL-MP-92

SANTA BARBARA CELLULAR SYSTEMS, LTD.
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 124
Santa Barbara-Santa Maria-Lompoc, California
File No. 07608-CL-MP-92

CENTEL CELLULAR CO. OF CHARLOTTESVILLE
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 256
Charlottesville, Virginia
File No. 07293-CL-MP-92

CENTEL CELLULAR CO. OF TALLAHASSEE
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 168
Tallahassee, Florida
File No. 07268-CL-MP-92

CROOK COUNTY RSA LIMITED PARTNERSHIP
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 611
Crook, Oregon
File No. 07530-CL-MP-92

SYRACUSE SMSA LIMITED PARTNERSHIP
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 53
Syracuse, New York
File No. 07325-CL-MP-92

NEW YORK CELLULAR GEOGRAPHIC SERVICE AREA, INC.
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 6
Boston, Massachusetts
File Nos. 07493-CL-MP-92
07503-CL-MP-92
07528-CL-MP-92

TWR CELLULAR, INC. File No. 06996-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 165 Fort Smith, Arkansas-Oklahoma

SUSQUEHANNA CELLULAR COMMUNICATIONS LIMITED PARTNERSHIP File No. 07259-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 84 Harrisburg, Pennsylvania

MIDWEST CELLULAR TELEPHONE CO. File No. 07277-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 45 Oklahoma City, Oklahoma

JACKSONVILLE CELLULAR TELEPHONE CO. File No. 07035-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 51 Jacksonville, Florida

REDDING CELLULAR PARTNERSHIP File No. 07034-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 254 Redding, California

LOS ANGELES CELLULAR TELEPHONE CO. File Nos. 06980-CL-MP-92 06981-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 2 Los Angeles, California

AMARILLO CELLTELCO File No. 07394-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 188 Amarillo, Texas

MANCHESTER NECMA, L.P., File No. 06372-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 133 Manchester-Nashua, New Hampshire

TELESPECTRUM, INC. File No. 05731-CL-MP-92
For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market No. 258 Jacksonville, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1992; Released: December 23, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. The Committee for Effective Cellular Rules (Committee) has filed petitions to dismiss, deny, or defer[1] all of the captioned applications to modify existing cellular systems. In addition, SLO Cellular (SLO) has filed a petition to deny the captioned application of Santa Barbara Cellular

[1] Committee's captioned petitions raise the same standing argument that the Mobile Services Division (MSD) rejected in *GTE Mobilnet of Terre Haute, et al.*, DA 92-1484 (Mobile Serv. Div. 1992) (*Terre Haute*), *petition for recon. filed*, December 3, 1992. It contends that it has standing because: (i) its position in the concurrent unserved areas rulemaking proceeding would be prejudiced were the captioned applications granted; (ii) one of its members has an interest in filing an application for unserved areas; and (iii) it is a "representative" of the public interest. As these are the same standing arguments rejected in the above

Systems, Ltd. (Santa Barbara). We are consolidating the petitions because they raise similar issues.[2] For the reasons discussed below, we deny all the petitions.

II. DISCUSSION

2. Committee first argues in its petitions that the captioned applications prematurely seek to cover unserved areas.[3] We reject this argument. The *First Report and Order* defined an unserved area as any area "where there is no [Cellular Geographic Service Area] CGSA." 6 FCC Rcd at 6200 (footnote omitted). The *Second Report and Order* set forth a CGSA definition based on a 32 dBu standard, which became effective on July 16, 1992. Each of the captioned applications was filed before July 16, and each seeks to add new cells within existing CGSAs. Furthermore, each of the captioned licensees had defined its CGSA as coterminous with its market boundaries before July 16, 1992. Because pre-July 16 rules apply, each of the captioned applications legitimately seeks to augment service area lying within its authorized CGSA.

3. Nor can we adopt Committee's alternative argument that granting the captioned applications would be arbitrary and capricious because the Commission has not set a *de minimis* standard for 32 dBu, as opposed to 39 dBu, contour extensions. Committee argues that, under Section 22.903 of the Commission's Rules, *de minimis* extensions constitute new CGSA territory.[4] *De minimis* extensions generally do not become part of the licensee's CGSA, are not entitled to interference protection, and must be pulled back if objectionable interference occurs to adjacent licensees. See *Terre Haute* at para. 5. Indeed, even if the unserved areas rules cited by Committee were to apply, it would not be arbitrary and capricious to grant 32 dBu contour extensions because the Commission has already held that:

> [c]ase law guidelines for service area boundary de minimis extensions will be applied as adjusted for the [32 dBu] formula, [and] new service area boundary extensions created solely by this change are considered de minimis and are hereby authorized.

Second Report and Order, 7 FCC Rcd at 2456, n.35. Accordingly, we can find no basis for holding that the captioned applications seek unserved areas or would otherwise be subject to those rules.[5] We therefore deny the petitions Committee has filed which raise these arguments.[6]

4. The remainder of Committee's petitions are predicated on the viability of a petition for rulemaking that it filed which proposed changes to the rules regarding unserved areas. However, we dismissed that petition. See Letter from Chief, Mobile Services Division, to Lewis J. Paper, Esq., 1600D-JMT/BG (Nov. 20, 1992) (dismissing petition for rulemaking). In that petition, Committee principally sought: (i) repeal of Section 22.23(c)(3)(ii), which was adopted in the unserved areas proceedings in order to enable cellular licensees to expand their authorized CGSAs within their markets without additional prior Commission authorization; and (ii) modification of Section 22.31 of the Rules to allow for the filing of competing applications in response to any application filed by an incumbent cellular licensee that expands its CGSA. We rejected these arguments, holding that the changes were unwarranted, and that the rules justifiably advanced the Commission's policy objectives by allowing cellular licensees to build out their systems within their markets quickly, completely, and untrammeled by competing applications. *Id.* Accordingly, the petitions filed by Committee in sole reliance on its petition for rulemaking are moot.

5. For its part, SLO argues that the contour extension proposed by Santa Barbara is not *de minimis*. SLO contends that Santa Barbara has not directionalized its signal, evidencing an intent primarily to serve a state highway and "large farming operation" located in petitioner's market. SLO Petition to Deny at 6-7, *citing Advanced Mobile Phone Service, Inc.*, 52 Rad. Reg. 2d (P&F) 1593, 1602 (Com. Car. Bur. 1983); *Syracuse SMSA L.P.*, 66 Rad. Reg 2d (P&F) 1778 (Com. Car. Bur. 1989). We reject these arguments.

6. In evaluating *de minimis* contour extensions, the Commission first determines whether the proposed contour is minimal in size, and if so, then considers whether there are any engineering justifications for it. *See GTE Mobilnet of South Texas, L.P.*, 4 FCC Rcd 1657 (1989). Engineering factors include the terrain and population of the area in question, the shape of the adjoining boundary, and any extenuating engineering problems. *Saco River Cellular Telephone Co.*, 2 FCC Rcd 2009 (1987). Santa Barbara's proposal satisfies these standards. While it does cover a portion

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Terre Haute proceeding, we again deny standing here, but treat the petitions as requests for an informal opinion, pursuant to Section 1.41 of the Commission's Rules.

[2] Committee has also filed requests for extensions of time to file reply pleadings. We deny the requests, but accept the replies as informal pleadings and fully consider them herein.

[3] Committee cites to the following unserved areas rulemaking proceedings: *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, First Report and Order and Memorandum Opinion on Reconsideration*, 6 FCC Rcd 6185 (1991) (*First Report and Order*); *Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, Second Report and Order*, 7 FCC Rcd 2449 (1992) (*Second Report and Order*).

[4] Under the unserved areas rules, a *de minimis* extension into an adjacent market becomes part of the extending licensee's CGSA, but only if the adjacent licensee does not file an application for the extension area, before the end of the five-year fill-in period. *First Report and Order*, 6 FCC Rcd at 6229. Until the fill-in period lapses in the adjacent market, the extending licensee receives no interference protection in the extension area. *Id.* However, except as discussed *infra* at note 5, none of the captioned applications proposes an extension into an unserved area.

[5] However, we note that the application of New York Cellular Geographic Service Area, Inc. (NYCGSA) (File No. 07528-CL-MP-92) proposes an extension into a market for which the five-year fill-in period had already lapsed. Therefore, the extension would impermissibly cover an unserved area. Accordingly, quite apart from Committee's arguments, we must dismiss the NYCGSA application.

[6] We note that the expense of time and resources to address what appear to be frivolous pleadings is a detriment to the public interest. *See Terre Haute* at n.6. Committee appears to be invoking Commission procedures in order to delay service to the public. We therefore warn Committee, and any others, that we are prepared to impose abuse of process remedies should meritless petitions be filed in the future.

of a state highway, the extension constitutes only 17 percent of the overall proposed cell, Santa Barbara was limited in site choice because the area is heavily forested, and the U.S. Forest Service approved only the proposed site. See Opposition to Petition to Deny, Appendix 1, Declaration of Chris Scott. Furthermore, SLO's contention that Santa Barbara has not mitigated its extension by directionalizing its signal is inaccurate because it did "downtilt" its antenna to the extent possible while still preserving meaningful coverage within its market.[7] *Id.* In sum, we find that Santa Barbara has satisfied the *de minimis* standard, and we reject SLO's contentions.

7. SLO also argues that the Commission should not approve Santa Barbara's 39 dBu extension proposal because under the 32 dBu measure Santa Barbara's proposal would sufficiently cover its market. We reject this argument. The 32 dBu standard did not become effective until July 16, 1992. See supra at para. 2. Santa Barbara's application was filed prior to that date. Therefore, the 32 dBu standard does not apply.[8] Accordingly, we reject Santa Barbara's petition to deny.

III. ORDERING PARAGRAPHS

8. Accordingly, IT IS ORDERED THAT the Petitions to Dismiss, Deny, or Defer filed by the Committee for Effective Cellular Rules, and SLO Cellular, in the captioned proceedings ARE DENIED.

9. IT IS ALSO ORDERED THAT the applications of Western Maine Cellular, Inc., (File No. 08288-CL-MP-92); Portland Cellular Partnership (File Nos. 07505-CL-MP-92 and 07506-CL-MP-92); Parkersburg Cellular Telephone Co., (File No. 07526-CL-MP-92); Bell Atlantic Mobile Systems, Inc. (File No. 08286-CL-MP-92); Santa Barbara Cellular Systems, Ltd. (File No. 07608-CL-MP-92); Centel Cellular Co. of Charlottesville (File No. 07293-CL-MP-92); Centel Cellular Co. of Tallahassee (File No. 07268-CL-MP-92); Crook County RSA Limited Partnership (File No. 07530-CL-MP-92); Syracuse SMSA Limited Partnership (File No. 07325-CL-MP-92); New York Cellular Geographic Service Area, Inc., (File Nos. 07493-CL-MP-92 and 07503-CL-MP-92); TWR Cellular, Inc. (File No. 06996-CL-MP-92); Susquehanna Cellular Communications Limited Partnership (File No. 07259-CL-MP-92); Midwest Cellular Telephone Co. (File No. 07277-CL-MP-92); Jacksonville Cellular Telephone Co. (File No. 07035-CL-MP-92); Redding Cellular Partnership (File No. 07034-CL-MP-92); Los Angeles Cellular Telephone Co. (File Nos. 06980-CL-MP-92 and 06981-CL-MP-92); Amarillo Celltelco (File No. 07394-CL-MP-92); Manchester NECMA, Limited Partnership (File No. 06372-CL-MP-92); and Telespectrum, Inc. (File No. 05731-CL-MP-92) ARE GRANTED.

10. IT IS FURTHER ORDERED THAT the application of New York Cellular Geographic Service Area, Inc., (07528-CL-MP-92) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko,
Chief, Mobile Services Division
Common Carrier Bureau

[7] SLO also asserts that Santa Barbara uses the wrong effective radiated power (ERP) figures and propagation patterns in its application, understating the actual coverage of the cell by representing it as directional. We disagree. Santa Barbara has submitted the correct figures for a down-tilted antenna.

[8] We note that even if the 32 dBu standard did apply in the instant case, the Commission has already provided that any new service area extensions created solely by the change from a 39 dBu standard to a 32 dBu standard are considered to be *de minimis* by definition. *See supra* at para. 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-303

In re Applications of

SKYLINE BROADCASTERS, INC. (hereafter "Skyline") File No. BPH-910925MD

TOM SEABASE (hereafter "Seabase") File No. BPH-910926MB

CLOUD NINE BROADCASTING, INC. (hereafter "Cloud Nine") File No. BPH-910926MI

For Construction Permit
for a New FM Station on Channel 292A
in Kalispell, Montana

HEARING DESIGNATION ORDER

Adopted: December 8, 1992; Released: December 23, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Skyline.* On April 8, 1992, Skyline filed a petition for leave to amend, proposing to reduce its tower height to accommodate the concerns of the Federal Aviation Administration (FAA). We will grant the petition for good cause shown and accept the amendment. Since the amendment was filed after expiration of the time period for filing amendments as of right, any comparative advantage resulting from the amendment will be disallowed. Additionally, we note that the amended tower height values for the proposed 260 foot (79.2 meter) tower do not agree with the FAA's determination. Specifically, the amendment shows a tower height above mean sea level of 1207 meters (3960 feet) while the FAA clearance lists a value of 1210 meters (3970 feet). Using the values specified in the FAA clearance, we find that the other application parameters -- the site elevation and the antenna radiation center heights -- would all be increased by 3 meters. This difference would not cause Skyline's application to violate any Commission rule. Nonetheless, Skyline must submit a clarifying amendment to the Administrative Law Judge within 30 days of the release of this Order to eliminate the noted discrepancy.

3. *Tower Height.* An engineering review of the Seabase and Cloud Nine applications reveals that the applicants propose to side-mount on the existing tower of translator Station K240BT, Kalispell, Montana (BLFT-890207TB). FCC and FAA records show that the translator tower's overall tower height above ground level (OHAGL) and overall tower height above mean sea level (OHAMSL) as 45.1 meters and 1180.5 meters, respectively. However, both Seabase and Cloud Nine have specified the tower's OHAGL as 40 meters and OHAMSL as 1175 meters. Therefore, the applicants are required either to amend the tower height data specified in their respective applications to comply with FCC and FAA records or, if the heights specified in the application are the actual heights, file with the FAA (FAA Form 7460-1) to correct the tower height discrepancy.

4. Additionally, there is a possibility that the proposed FM antennas and transmission lines will disrupt the translator's directional antenna pattern because the FM antennas will be mounted above K240BT's antenna and the proposed FM transmission lines will be placed near K240BT's antenna. Accordingly, Seabase and Cloud Nine must submit an exhibit, including a statement from the K240BT antenna manufacturer, stating that the proposed antenna will have no adverse effect on the translator's directional antenna pattern.

5. *Residence Address.* Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Seabase has not completed Item 6 correctly. Seabase's application gives a post office box number as the address for itself and for the residence of its sole principal, Tom Seabase. Accordingly, Seabase must submit as amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this order is released.

6. *Late-Filed Amendment.* On April 30, 1992, after the last date for filing amendments as of right, Seabase filed a petition for leave to amend its application. Under Section 1.65 of the Commission's Rules, the petition will be granted, and the amendment accepted. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Skyline shall submit the information, specified in Paragraph 2, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That Seabase and Cloud Nine shall submit the information, specified in Paragraphs 3 and 4 above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Seabase shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Skyline (4/8/92) and Seabase (4/30/92) ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein at paragraphs 2 and 6.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-302

In re Applications of

JOHN M. GIANNETTINO File No. BPH-910719MA
(hereafter "Giannettino")

JOHN T. PRITCHARD File No. BPH-910722MI
(hereafter "Pritchard")

For Construction Permit
for a New FM Station on Channel 276C3
in Burlington, Iowa

HEARING DESIGNATION ORDER

Adopted: December 8, 1992; Released: December 23, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Informal Objection.* On December 6, 1991, Talley Broadcasting Company ("TBC"), licensee of radio stations KBKB and KBKB-FM, Fort Madison, Iowa, filed an informal objection against the Pritchard application. The basis for the objection is TBC's "concern about the proximity of the tower site proposed in the Pritchard application to the tower site of KBKB-FM, the potential for interference to the radio air navigation localizer at the municipal airport and the potential for receiver induced intermodulation interference [to KBKB-FM]." In support of its objection, however, TBC refers to the FAA's "determination of no hazard" to the construction of the proposed tower. Therein, the FAA specified a condition which delineated the steps to be taken by Pritchard in the event of any harmful interference to FAA facilities due to his operation. Moreover, in his "Engineering Statement" Pritchard states that "if instances of objectionable interference to any station, broadcast or non-broadcast, due to the proposed facility should arise, the applicant will cooperate fully, as appropriate, to eliminate the interference." Therefore, based on the foregoing, we find TBC's "concerns" baseless and that grant of Pritchard's application would be consistent with the public interest. Accordingly, the TBC informal objection will be denied.

3. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that Giannettino and Pritchard did not address the matter of how they would protect workers on their tower from RF radiation exposure. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Giannettino and Pritchard may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Giannettino and Pritchard failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally* OST Bulletin No. 65, *supra*, at 28. Accordingly, Giannettino and Pritchard will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. *See* 47 C.F.R. § 1.1308(d).

4. *Divestiture.* John T. Pritchard is a principal of KKMI (FM), Burlington, Iowa. John T. Pritchard has indicated his intent to terminate his relationship with KKMI (FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Pritchard's application, John T. Pritchard will be required to sever all connection with KKMI (FM) prior to the commencement of program test authority.

5. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Giannettino or Pritchard in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1.1319.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the TBC informal objection IS HEREBY DENIED.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Giannettino and Pritchard shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That in the event of grant of Pritchard's application, John T. Pritchard will be ordered to divest Station KKMI (FM) prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That in the event of grant of Pritchard's application, the construction permit (BPH-910722MI) shall contain the following FAA condition, referenced in Paragraph 2 above:

FAA INTERFERENCE CONDITION--- Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the permittee's transmitter, the permittee shall immediately reduce power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one (1) year of interference-free operation.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be (addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Citizens Utility Company AAD 91-30

Petition for Waiver of Section 36.154(d)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: July 2, 1992; Released: December 18, 1992

By the Chief, Common Carrier Bureau:

1. On June 19, 1991, Citizens Utilities Company, on behalf of its affiliate, Citizens of Arizona (Citizens) filed a petition for waiver of Section 36.154(d) of the Commission's Rules, 47 C.F.R. §36.154(d). This petition was placed on Public Notice on January 14, 1992, DA 92-32. The Public Notice also noted a letter from the National Exchange Carrier Association (NECA), submitted November 1, 1991, and included it in the record. No comments were filed.

2. Section 36.154 prescribes the procedures for allocating the nontraffic sensitive local loop costs between the interstate and intrastate jurisdictions. Section 36.154(d) prescribes the computation of a factor that allows for a transition from the present allocation of the subscriber plant factor (SPF) to 25 percent over the years 1986 through 1992. In determining the transitional SPF, the rule requires a carrier to offset costs allocated to the interstate jurisdiction under the Universal Service Factor (USF). Carriers are limited to a 5 percentage point reduction in this interstate allocation per year.

3. From 1986 to 1990, Citizens calculated its transitional SPF without offsetting costs allocated to the interstate jurisdiction under the USF. This caused Citizens to use an overstated transitional SPF for those years, with the result that it withdrew more from the NECA pools than it was entitled to under the Commission's rule. NECA discovered Citizens' error in December 1990, and requested repayment from Citizens to the interstate pool. According to NECA, Citizens wrongly collected $878,750 in 1989 and $1,299,475 in 1990. Citizens wrongly collected unspecified amounts in 1986, 1987, and 1988, but NECA does not seek repayment of those funds.[1]

PETITION

4. Citizens requests waiver of the rule for 1989 and 1990, and asks us to instruct NECA to allow Citizens to use its overstated transitional SPF for those years and to excuse it from repaying the $2.2 million it wrongly collected from NECA. Citizens agrees to use the correct transitional SPF from 1991 forward. Citizens justifies this request by stating that it inadvertently misinterpreted the Commission's rules and simply applied the 5 percentage point reduction without having performed the calculations required by the Commission's rules, specifically the offset for the USF, defined under Sections 36.154(d) and (f). Citizens contends that it has been calculating its SPFs in the same manner since the adoption of the rule, but that NECA did not advise it of the error until December 1990.

5. The rule specifies that LECs shall decrease this interstate allocation (the combined effect of the transitional SPF and the USF adjustment) by no more than 5% per year. Citizens decreased its transitional SPF by 5% per year, without reference to the USF adjustment. Citizens compares the SPFs it used (5% each year) with the SPFs it should have used to produce a 5% reduction each year, for 1982-1991, as follows:

Year	Citizens' Incorrect SPF	Correct SPF
1982-85	72.52%	72.52
1986	67.52	66.58
1987	62.52	60.64
1988	57.52	54.70
1989	52.52	48.76
1990	47.52	42.82
1991	42.52	36.88

Citizens claims that it relied on these misallocations as the basis in filing for a state rate increase in 1988. It contends that if the instant petition is denied, local rates could increase.

6. Citizens suggests that NECA's failure to uncover the Citizens error should serve to excuse Citizens' failure to correct. Citizens asserts that its miscalculation was an inadvertent mistake, and that it would be a hardship for Citizens to repay the two years' overcompensation.

DISCUSSION

7. We deny Citizens' waiver request, as Citizens has failed to show good cause for a waiver of the Commission's rules. Citizen asserts that it operated in good faith and that its error was inadvertent. This may be, but it does not excuse Citizens from its obligation to pay back upon discovery of its overcompensation. The rules are clear, and Citizens has a responsibility to apply the rules correctly. We also note that NECA takes steps -- including publication of newsletters and guidelines, as well as of annotated rules -- to assure that small companies understand and correctly apply the rules. Since NECA has not requested a reopening of books already closed, Citizens is being asked to repay only its 1989 and 1990 overcompensations, not the excesses it received in 1986, 1987, and 1988. Under these circumstances, it is difficult to see how Citizens could show good cause for a waiver, or how it can consider this partial repayment a hardship.

8. We also reject Citizens' claim that its error is excused by NECA's failure to spot the error and notify Citizens until December 1990. Citizens argues that NECA's failure to spot Citizens' error should serve not only to excuse Citizens for having made the error at all, but also from

[1] NECA discovered Citizens' error, and informed Citizens of it, in December 1990. Because of NECA's administration, which closes the books after 24 months, only calculations for the 24 months prior to this discovery are reviewable. Thus, NECA can seek repayment from Citizens only for the 1989 and 1990 miscalculations.

having to restore an amount in excess of $2 million and correct the SPF calculations for the years in question. It is true that NECA has oversight responsibilities for carriers in the pool, to the extent of reviewing their filings and informing the carriers if there appears to be a problem. However, NECA's alleged delay in finding Citizens' error does not excuse Citizens' non-compliance with our rules.

9. We also reject Citizens' argument that a requirement that Citizens correct these calculations will necessarily result in a substantial increase in Citizens' local rates. It is not apparent why a correction of 1989 and 1990 SPFs would necessarily result in a change in Citizens' current local rates; Citizens is using the correct 1991 transitional SPF, and will use the correct SPF for 1992 as well, regardless of the outcome of its waiver request. Finally, we do not believe that Citizens has demonstrated that a requirement to repay $2.2 million to the NECA pool would be an undue hardship. Thus, we find that Citizens has failed to show good cause why the requested waiver should be granted.

ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§0.291, 1.3 that the petition filed by Citizens Utilities Company of Arizona for waiver of Section 36.154(d) of the Commission's rules, 47 C.F.R. §36.154(d), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 16, 1992

UNITED TELEPHONE - SOUTHEAST FILES PETITION FOR WAIVER TO RECOVER STATE-MANDATED INFRASTRUCTURE DEVELOPMENT COSTS

Pleading Cycle Established

COMMENTS: January 15, 1993
REPLY COMMENTS: January 29, 1993

On November 19, 1992, United Telephone - Southeast (United) filed a petition for waiver of Section 61.45(d) of the Commission Rules, 47 C.F.R. § 61.45(d), which limits exogenous cost changes under price caps to seven specific items. United is seeking Commission approval to treat exogenously amoritzation costs resulting from the premature retirement of four central office switches in the company's Tennessee study area. The early replacement of these switches has been ordered by the Tennessee Public Service Commission (TPSC).

United asserts that as a result of regulatory mandate, it is incurring additional costs that are beyond its control. United further asserts that the TPSC has developed a mechanism that allows United to recover the intrastate portion of these costs. United contends that it should be permitted to recover the associated interstate costs by adjusting its price cap indices and interstate access rates.

Interested parties may file comments regarding United's petition no later than January 15, 1993. Reply comments may be filed no later than January 29, 1993.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1990 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the petition and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Applications for New Private
Land Mobile Radio Service
Stations in the 220-222 MHz Band

ORDER

Adopted: December 14, 1992; Released: December 23, 1992

By the Chief, Private Radio Bureau:

1. On behalf of various clients who have filed applications for "local" channels in the 220-222 MHz band, the law firm of Brown and Schwaninger (petitioner) seeks reconsideration of one portion of our Public Notices ordering lotteries for these applications.[1] In particular, the petitioner challenges our decision to process applications in the order of their lottery ranking, with petitions to deny investigated and resolved prior to issuance of any licenses, but with processing of lower ranked applications continuing during the pendency of such investigation under the assumption that the license will be granted. The petitioner asserts that this process violates the holding of *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), in that the disposal of petitions to deny could have a direct and controlling impact on the acceptability of mutually exclusive proposals with lower rankings in the lottery.

2. By letter of November 24, 1992, we denied the only petition to deny submitted in connection with any of the 220-222 MHz applications.[2] No application in the lottery, therefore, has pending against it a petition to deny. The petition for reconsideration is accordingly moot and we dismiss it as such. We emphasize, however, that this action does not, and cannot be considered to, accept petitioner's argument on the merits. We have before us a large number of applications (over 58,000) for channels in the 220-222 MHz band, none of them substantially or materially different from another. No financial requirements have been imposed upon applicants, no preferences will be awarded to any, and no other bases for comparative consideration are present. Under these circumstances, and in light of the public interest in bringing new service to the public in as expeditious a manner as possible, we find no conflict between our lottery procedures and the *Ashbacker* decision. There are ample public interest considerations justifying the course we have selected.[3]

3. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Brown and Schwaninger IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] These Public Notices include DA 92-1231, released September 10, 1992, and FCC Mimeo 24813, released September 16, 1992.

[2] Letter to Mr. Howard J. Braun, Esquire, from W. Riley Hollingsworth, Deputy Chief, Licensing Division.

[3] The Ashbacker decision acknowledges that public interest considerations may influence the manner in which applications are processed, 326 U.S. at 333.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-90

In the Matter of

Rules and Regulations Implementing
the Telephone Consumer Protection Act
of 1991

ORDER

Adopted: December 18, 1992; Released: December 18, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This *Order* responds to two requests for stay of the effective date of final regulations adopted in this proceeding.[1] First, the Consumer Electronics Group of the Electronic Industries Association and the Telecommunications Industry Association ("Manufacturers' Associations") have filed a Petition for Stay ("Petition") of the effective date of Section 68.318(c)(3) of the rules, 47 C.F.R. § 68.318(c)(3), insofar as it requires that telephone facsimile machines manufactured after December 20, 1992 clearly mark identifying information on each facsimile transmission. *See* Section 68.318(c)(3) of the Commission's rules, 47 C.F.R. § 68.318(c)(3), as amended. The Petition requests that the Commission stay the effective date with respect to the manufacturing requirement until six months after issuance of a ruling on a Petition for Reconsideration and Clarification ("Petition for Reconsideration") filed by the Manufacturers' Associations in this proceeding. Second, the American Financial Services Association, American Resort Development Association, Direct Marketing Association, Direct Selling Association, National Association of Manufacturers, National Association of Realtors, and National Retail Federation ("Telemarketing Associations") have filed a Joint Motion for Deferral of Effective Date of Certain Requirements ("Joint Motion") set forth in § 64.1200(e)(2) of the rules. For the reasons stated below, we deny both requests.

II. CONTENTIONS

2. *Request for Stay of Section 68.318(c)(3).* Pursuant to the Telephone Consumer Protection Act of 1991 (TCPA), Pub.L. No. 2102-243, 105 Stat. 2394 (Dec. 20, 1991), the *Report and Order* implements regulations which restrict the use of automatic telephone dialing systems ("autodialers"), artificial or prerecorded messages, and telephone facsimile machines. The regulations also restrict the making of telephone solicitations. The *Report and Order* revises Part 68 of the Commission's rules to require that any person transmitting a message by telephone facsimile machine must clearly mark the message with the date and time of transmission, the sender's identity, and the telephone number of the sender or the sending machine. 47 C.F.R. § 68.318(c)(3); *see* § 227(d)(1) of the TCPA. Our rules further require that the Commission revise its regulations to require that telephone facsimile machines manufactured after the effective date automatically transmit this identifying information. § 68.318(c)(3); *see* § 227(d)(2). The TCPA stipulates that its requirements shall take effect one year after the date of enactment (December 20, 1991). *See* Section 3 of the TCPA. The Manufacturers' Associations request that the Commission stay the effective date of the manufacturing requirement for a period of six months, beginning on the date the Commission issues an order on their Petition for Reconsideration in this proceeding. In support of their request, the Manufacturers' Associations state that their Petition for stay easily satisfies the criteria for grant of a stay, established in *Virginia Petroleum Jobbers Association v. F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Virginia Petroleum Jobbers*); *see also Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669 (1985). Under the four-pronged test set forth in these decisions, a stay may be granted where (1) the petitioner has shown that it is likely to prevail on the merits; (2) the petitioner will be irreparably injured absent a stay; (3) the issuance of a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.

3. The Manufacturers' Associations contend that several factors make the instant case compelling. They believe there is a strong likelihood their petition to reconsider the manufacturing deadline will be successful because the least expensive telephone facsimile machines, those marketed primarily to the consumer marketplace, do not have the capability to mark the date and time of transmission. Due to the complexity and expense of redesigning these "low-end" machines, consumers would be forced to purchase higher-priced machines or wait a minimum of six months until redesign is complete. The Manufacturers' Associations maintain that the purpose of the manufacturing requirement would not be jeopardized by the requested stay, because the TCPA would still require persons sending facsimile messages to place identifying information on each transmission, and would ban unsolicited advertisements to facsimile machines. In addition, the Manufacturers' Associations contend that an ambiguity over the application of the rules to "fax boards" (which enable computers to send and receive electronic messages over telephone lines) would allow continued abuses by those most likely to misuse facsimile machines, *i.e.*, businesses determined to violate the TCPA by failing to provide identification. Thus, they argue (both in this proceeding and in their petition for reconsideration), the manufacturing requirement unfairly burdens manufacturers of telephone facsimile machines without addressing the devices most likely used to

[1] *See Report and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, FCC No. 92-443 (October 23, 1992) ("*Report and Order* ").

cause the abuses targeted by the TCPA, *i.e.*, fax boards. Moreover, the Manufacturers' Associations contend that the TCPA was intended to impose only a minimal burden on manufacturers of telephone facsimile machines. Finally, the Manufacturers' Associations assert that the period allowed under this *Report and Order* for compliance is much shorter than periods provided for compliance with prior amendments of Part 68. The Manufacturers' Associations state that these factors, combined with the need for clarification of several issues prior to any transitional period for compliance, create a strong likelihood of success on the merits in the reconsideration proceeding, and that therefore stay is warranted.

4. The Manufacturers' Associations maintain that the Petition satisfies the remaining three criteria for grant of a stay. They state that manufacturers of facsimile machines would suffer irreparable injury due to the uncertainty, disruption, and expense that would be caused if the date and time stamping requirements were imposed on December 20, 1992, before the issues raised in the Petition for Reconsideration are addressed. The Manufacturers' Associations maintain that other interested parties will not be substantially harmed by an extension of time for compliance with the manufacturing requirement because, as noted above, the TCPA and our rules require that all facsimile machine users place identifying information on each transmission. 47 U.S.C. § 227(d)(1); 47 C.F.R. § 68.318(c)(3). The Manufacturers' Associations assert that most machines are capable of transmitting the most relevant information, *i.e.*, the sender's name and telephone number, with each facsimile message. They contend that it is clearly in the public interest to impose a stay that would preserve the *status quo ante*, avoid the harm caused to consumers by higher facsimile machine prices, and relieve manufacturers of the burden of immediate compliance with the manufacturing requirement.

5. The Manufacturers' Associations acknowledge that the December 20, 1992 effective date is mandated by the TCPA, but contend that the language of the TCPA nevertheless authorizes the Commission to grant their request for a stay. They point out that in contrast to other self-executing provisions of the TCPA, particularly §§ 227(b)(1)(C) and (d)(1)("It shall be unlawful for any person..."), the section of the statute which sets forth the manufacturing requirement, § 227(d)(2), requires implementation by Commission regulation ("The Commission shall revise the regulations..."). The Manufacturers' Associations maintain that the language reflects Congress' intent that the Commission's rulemaking process be employed to specify the requirements applicable to the manufacture of facsimile machines. They contend that Congress would have been aware that the Commission's rules may be suspended, revoked, amended, or waived for good cause. Accordingly, they argue, the Commission may exercise its discretion to prevent any undue burden to the industry by delaying implementation, where the delay would not thwart the purpose of the statute. In the alternative, the Manufacturers' Associations urge the Commission to exercise its discretion to suspend enforcement of the rules, as it has done recently with respect to the television vertical blanking interval.[2]

6. *Joint Motion for Deferral of Rules for Making Telephone Solicitations.* Section 64.1200(e)(2) of the rules, 47 C.F.R. § 64.1200(e)(2), sets forth specific requirements for persons or entities who make telephone solicitations, including rules regarding the establishment and maintenance of company-specific lists of residential subscribers who have requested not to receive further solicitations. 47 C.F.R. § 64.1200(e)(2).[3] The Telemarketing Associations request a 60-day deferral of these requirements, arguing that a grant of a deferral under the circumstances is consistent with past Commission decisions delaying the effective date of its rules. The Telemarketing Associations maintain that the request is reasonable, given that § 64.1200(e)(2) imposes substantive rules which require changes in business practices and contractual relationships. The Telemarketing Associations state that unanticipated policy determinations, such as requirements that some affiliated entities maintain a do-not-call list and that the party on whose behalf a solicitation is made will be liable for violations of the Commission's rules, require changes in business relationships which cannot be properly accomplished in approximately 60 days between the release of the *Report and Order* and the December 20, 1992 effective date. Moreover, they assert, that the period of time is inadequate for the purpose of training personnel in the new rules. The Telemarketing Associations contend that the delay will not materially alter the expectations of the rules' intended beneficiaries, and that the likelihood of any claims of violations of § 64.1200(e)(2) arising during the requested 60-day interim period is remote.

III. DISCUSSION

7. *Section 68.318(c)(3) of the Rules.* We reject the Manufacturers' Associations' contention that they will suffer irreparable injury if the rules are not stayed. The Manufacturers' Associations present supporting affidavits by telephone facsimile machine manufacturers which predict significant monetary losses through lost sales, loss of existing stock, and retooling costs unless the Commission stays the December 20, 1992 date.[4] Even assuming the accuracy of these estimates, the Manufacturers' Associations have not established that such losses would be attributable to the imposition of the December 20, 1992 deadline established by the Commission's rules. The legislative history of the TCPA demonstrates that losses attributable to redesign and retooling were taken into account when the deadline was imposed in the statute.[5] The Manufacturers' Association has presented no evidence demon-

[2] *See Suspension of Section 73.682(a)(iv) of the Commission's Rules to Permit Additional Use of Line 19 of the Vertical Blanking Interval*, FCC 92-479 (released Nov. 4, 1992).

[3] This rule section requires that telephone solicitors: (1) maintain a written policy for making telephone solicitations; (2) train personnel in the existence and use of the solicitor's do-not-call list; (3) record and maintain do-not-call requests from residential telephone subscribers; (4) forward do-not-call requests to affiliates where appropriate; and (5) furnish identification to the residential subscriber during a solicitation.

[4] *See* Appendix to Manufacturers' Association Petition for Stay. Affidavits of Sharp Electronic Corporation, Matsushita Electric Corporation of America, and Samsung Electronics of America, Inc. predict millions of dollars in losses in sales, existing stock and redesign costs absent a stay.

[5] S. Rep. No. 178, 102d Cong. 1st Sess. 9 (1991).

strating their claim that they will suffer any additional harm which was not taken into account as a result of this legislatively imposed requirement, of which they have been on notice for a year. *See* §227(d)(2) of the TCPA. Moreover, it is conceivable that manufacturers could recover some losses as users purchase more expensive machines which allow them to place sender identification on each facsimile transmission automatically, rather than manually, as the TCPA clearly intends of facsimile machines manufactured after December 20, 1992. Machines manufactured before that date could continue to be sold. In light of legislative history on the manufacturing requirement, predictions by the Manufacturers' Associations of irreparable harm attributable to the imposition of the December 20, 1992 deadline are rejected as speculative. *See Virginia Petroleum Jobbers; Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

8. Additional arguments offered by the Manufacturers' Associations on the merits of the stay request are not persuasive. The Manufacturers' Associations have presented no evidence to support their claim that computer messaging by fax boards will be more susceptible to the types of abuse targeted by the Commission's rules than conventional telephone facsimile machines, and that therefore the manufacturing requirement unfairly burdens manufacturers of telephone facsimile machines.[6] Moreover, although the Commission has in past instances deferred the effective date of new Part 68 rules, the Manufacturers' Associations have not presented persuasive arguments that deferral is warranted where the statute clearly provides a date certain for implementation of its provisions.[7] We note that the separate manufacturing requirements, including a December 20, 1992 effective date, were specifically mandated by the TCPA, independent of the user identification requirements. Thus, had Congress believed the user identification requirements alone were adequate, it would not have adopted the manufacturing requirements.

9. With respect to the question of whether a stay would substantially harm other interested parties, the Manufacturers' Associations maintain that no other parties will be harmed by issuance of a stay, since the identification requirements imposed on users insure that the purpose of the manufacturing provision will not be defeated. While no parties have opposed the request for stay, it is important to note that facsimile machine users must begin compliance immediately with the identification requirements whether or not the requested stay is granted. Under these circumstances, the grant of a stay would affect the rules' intended beneficiaries by delaying the broad availability of facsimile machines which automatically transmit sender identification, and by extending the period in which consumers are burdened with the task of manually transmitting sender identification for each transmitted fax. In balancing the burdens of compliance on consumers and on manufacturers, particularly in view of what appears to be the clear intent of Congress, we find that the public interest weighs against a stay. In view of the foregoing, we conclude that the Manufacturers' Associations have not met the requirements established in *Virginia Petroleum Jobbers*.

10. The Manufacturers' Associations have not persuaded us that special circumstances warrant suspension of enforcement of our rules with respect to the effective date for the manufacturing requirement. *See* 47 C.F.R. § 1.3; *see Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). The Manufacturers' Associations have had notice of the effective date of the rules implemented in this proceeding, and its specific application to manufacturers, since enactment of the TCPA more than 10 months ago. *See* Section 3 and § 227(d)(2) of the TCPA (requiring that machines "... manufactured after one year after the date of enactment of this section..." must clearly mark identifying information). We do not believe that the concerns regarding potential ambiguities in interpretation and burdens of compliance represent a special set of circumstances warranting deviation from the Commission's rules, particularly in light of the clear statutory intent and the fact that the Manufacturers' Association had ample opportunity in the rulemaking proceeding to address precisely such issues. Under the circumstances, we find that a deviation from the rules is not warranted and would not serve the public interest.

11. *Rules for Making Telephone Solicitations.* Although styled as a Petition for Deferral of Commission action, in practical effect the Telemarketing Associations' pleading seeks a waiver or suspension of the December 20, 1992 effective date of § 64.1200(e)(2) of the Commission's rules for an interim period of 60 days. 47 C.F.R. § 1.3. We are not convinced that special circumstances warrant a deviation from the rules or that such deviation would serve the public interest. We cannot agree with Telemarketing Associations that the expectations of residential subscribers will not be substantially affected by deferral, or with the suggestion that the small likelihood of claims of violations during the 60-day period warrants a delay in implementation of the rules. The record in this proceeding reflects a strong interest among residential subscribers in obtaining relief from the number of telephone solicitations they receive. A delay in the effective date would increase the number of unwanted calls that subscribers would otherwise be subject to if the rules were effective December 20, 1992 as prescribed by the TCPA. The Telemarketing Associations' unsubstantiated assertions have not persuaded us that special circumstances warrant an additional 60 days for compliance with the rules, nor that the public interest would be served by subjecting residential subscribers to further unwanted telephone solicitations during a 60 day interim period. We conclude that the public interest in allowing residential subscribers to avoid telephone solicitations on the effective date, as expected, outweighs the possible benefits of permitting additional time.

IV. CONCLUSION

12. We believe the intent of Congress in passing the TCPA is clear. For the foregoing reasons, we deny the request of the Manufacturers' Associations for a stay of the December 20, 1992 effective date of our rules, and we deny the Telemarketing Associations' request for waiver or suspension of the rules for an interim 60-day period. As noted

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[6] We do not address, and reserve for reconsideration on the merits, the contention by the Manufacturers' Association that fax boards are not subject to the Commission's rules.

[7] *See, e.g., Petitions Seeking Amendment of Part 68*, 76 FCC 2d 246, 251-52 (1980); *Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network*, 50 Fed.Reg. 48,203, 48,208 (1985).

above, we reject the suggestion by the Manufacturers' Association that we decline to enforce 47 C.F.R. § 68.318(c)(3) for an interim period.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that the petition and motion before the Bureau ARE DENIED. This action is taken pursuant to authority delegated under Sections 0.91 and 0.291 of the Commission's rules.

14. IT IS FURTHER ORDERED, that this action IS EFFECTIVE ON ADOPTION.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-256

In the Matter of

Application of Open Network
Architecture and Nondiscrimination
Safeguards to GTE Corporation

NOTICE OF PROPOSED RULEMAKING

Adopted: November 5, 1992; Released: December 2, 1992

Comment Date: February 1, 1993
Reply Comment Date: March 3, 1993

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we propose to apply to GTE Corporation (GTE) the same regulatory framework of Open Network Architecture (ONA) that applies to the Bell Operating Companies (BOCs) for GTE's participation in the enhanced services market. Building on the substantial experience gained with the BOCs, we propose measures to speed GTE's implementation of ONA and nondiscrimination safeguards.

II. BACKGROUND

2. Over the last six years, in the *Computer III* and *ONA* proceedings, the Commission has established a comprehensive regulatory framework of nonstructural safeguards, consisting of ONA requirements and nondiscrimination safeguards, to govern the BOCs' participation in the enhanced services market.[1] Under ONA, the BOCs are required to offer an unbundled set of ONA services to enhanced service providers (ESPs) based on expected market demand, the services' utility as perceived by enhanced service competitors, and technical and costing feasibility.[2] By requiring the BOCs to offer unbundled network services to ESPs, ONA creates increased opportunities for ESPs to provide, and customers to receive, a wide range of enhanced services.[3] The *Computer III* nondiscrimination safeguards consist of Customer Proprietary Network Information (CPNI) rules, network information disclosure rules, and nondiscrimination reporting requirements.[4] The CPNI rules, which govern the BOCs' treatment of CPNI, permit the BOCs to participate efficiently in the enhanced services market while balancing efficiency, competitive equity, and privacy considerations.[5] Network information disclosure rules ensure that independent ESPs receive timely access to technical information related to new or modified network services affecting the interconnection of enhanced

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[1] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*); *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*); *further recon.*, 4 FCC Rcd 5927(1988) (*Phase II Further Reconsideration Order*); *Phase II Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review pending*, California v. FCC, No. 90-70336 (and consolidated cases) (9th Cir. filed July 5, 1990); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (and consolidated cases) (9th Cir. filed Feb. 14, 1992); Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (*BOC ONA Order*), *recon.*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*), *Erratum*, 5 FCC Rcd 4045, *pets. for recon. pending, pets. for review pending*, California v. FCC, No. 90-70336 (and consolidated cases) (9th Cir. filed July 5, 1990), 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendment Order*), *pet. for review pending*, MCI Telecommunications Corp. v. FCC, No. 92-70189 (9th Cir. filed Feb. 19, 1992).

[2] *Phase I Order*, 104 FCC 2d at 1065-66, para. 217.

[3] ONA establishes increased opportunities for all ESPs to use the BOCs' regulated networks in efficient ways by making available these unbundled ONA services. Under the ONA model, ESPs obtain access to various optional, unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other elements of the model include Complementary Network Services (CNSs), which are optional, unbundled basic service features that an end user may obtain from a carrier in order to receive or use an enhanced service, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection, which may be useful to ESPs. ONA, by requiring BOCs to offer unbundled network services to ESPs, also serves as a safeguard against discrimination. *See BOC ONA Amendment Order*, 5 FCC Rcd at 3104.

[4] As a Tier 1 local exchange carrier (LEC), GTE is already fully subject to the same cost accounting safeguards as the BOCs. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, Report and Order, 2 FCC Rcd 1298, 1304-05 (1987) (*Joint Cost Order*), *recon.* 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.*, Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[5] Our CPNI rules apply with minor exception to all information obtained by the BOCs as a result of a customer's use of network services. *BOC ONA Order*, 4 FCC Rcd at 215. Under our CPNI rules, the BOCs' enhanced services marketing personnel may not access the CPNI of customers with more than twenty lines unless they have obtained prior authorization from the customer, nor can they access the CPNI of any customer that requests that such information be withheld from BOC personnel. Independent ESPs must obtain advance authorization from the customer in order to obtain access to customer CPNI. The rules also require that the BOCs provide an annual written notice of CPNI rights to all multi-line business customers, and that any aggregated CPNI that a BOC makes available to em-

services to the BOC networks.[6] Nondiscrimination reporting requirements protect against possible discrimination against ESPs by the BOCs in the quality, and installation and maintenance, of basic services. These requirements focus on the level of service of BOC basic services used in providing the BOC's own enhanced services, as compared with that of BOC basic services used by their enhanced services competitors.[7]

3. The Commission in *Computer III* required each BOC to submit an ONA plan showing how it proposed to implement ONA requirements and nondiscrimination safeguards. In the *BOC ONA Order* in 1988, the Commission found that the BOCs' plans complied in certain respects with the *Computer III* requirements, but required various modifications to each plan.[8] In May 1990, we concluded that the amended plans complied substantially with the requirements of the *BOC ONA Order*, approved each plan subject to further modifications, and established the final conditions for grant of relief from structural separation requirements.[9]

4. Shortly after the Commission approved the BOCs' ONA plans, the United States Court of Appeals for the Ninth Circuit in *California v. FCC* vacated *Computer III*.[10] The court found that the Commission had failed to justify adequately the decision to replace structural separation with nonstructural safeguards for BOC provision of enhanced services. Following *California v. FCC*, the Commission proposed to reinstate ONA, which had not been challenged before the Ninth Circuit, and to adopt a strengthened set of cost accounting and nondiscrimination safeguards to govern the BOCs' participation in the enhanced services market.[11] In the *ONA Remand Order*, the Commission required the BOCs to implement ONA regardless of the Commission's ultimate decision on the appropriate safeguards for BOC provision of enhanced services.[12] In the *BOC Safeguards Order*, the Commission instituted a strengthened set of cost accounting and nondiscrimination safeguards to govern the BOC's participation in the enhanced services market, and reestablished the final conditions for granting individual BOC petitions for structural relief.[13] Concurrent with that action, in the *BOC ONA Further Amendment Order*, the Commission approved some aspects of the BOCs' amendments to their ONA plans required in the *BOC ONA Amendment Order*, required each of the BOCs to submit amendments in four additional areas, and established ongoing reporting requirements.[14] In particular, the BOCs are required to file each year their projected deployment schedules for their ONA services; new ONA service requests from ESPs and ONA service requests that were previously deemed technically infeasible; SS7, ISDN, and IN projected deployment; new ONA services available through SS7, ISDN, and IN; various progress reports on the implementation of service-specific and long-term uniformity issues, billing information, and Operational Support System (OSS) services; and a list of BSEs used in the provision of the BOC's own enhanced services.[15] The semiannual reporting requirements include the filing of a matrix of BOC ONA services and state and federal tariffs; data regarding state and federal tariffs; the *ONA Services User Guide;* and other updated information in the areas of ESP requests, BOC responses, and services offered.[16] By November 1991, all BOCs had filed federal tariffs for their

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ployees involved in the marketing of its enhanced services must also be made available to independent ESPs on the same terms. *BOC Safeguards Order*, 6 FCC Rcd at 7605-14. BOCs must also develop password/ID systems for their databases containing CPNI. *BOC ONA Order*, 4 FCC Rcd at 223, para. 430; *BOC ONA Amendment Order*, 5 FCC Rcd at 3119, para. 137.

[6] Under our network information disclosure rules, a BOC must disclose the relevant network information to an ESP at the "make/buy point" subject to the ESP's execution of a nondisclosure agreement, and to the public at a point six to twelve months before introduction of the new or modified network service. *Phase II Order*, 2 FCC Rcd at 3087-88, paras. 107-12; *see Phase I Order*, 104 FCC 2d at 1080-86, paras. 246-55.

[7] Under our nondiscrimination reporting requirements, each BOC must: (1) demonstrate that its provisioning procedures and systems preclude discrimination in installation and maintenance, and quality of ONA services; (2) file annual affidavits attesting that it has not discriminated in the quality of installation and maintenance of ONA services provided to its ESP competitors; and (3) file quarterly reports comparing the timeliness of its installation and maintenance of ONA services for its own enhanced services operations with that for all customers. *See Phase I Order*, 104 FCC 2d at 1055-56, para. 192, 1066, para. 218; *Phase II Reconsideration Order*, 3 FCC Rcd at 1160, paras. 76-77; *BOC ONA Order*, 4 FCC Rcd at 235, para. 451, 248-49, para. 481.

[8] *BOC ONA Order*, 4 FCC Rcd at 255-60, para. 496.

[9] *BOC ONA Amendment Order*, 5 FCC Rcd at 3104, para. 1, 3120, para. 149; *see infra* note 13.

[10] *See* 905 F.2d at 1217.

[11] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174 (1990); Computer III Remand Proceeding, Notice of Proposed Rulemaking, 5 FCC Rcd 5242 (1990).

[12] *ONA Remand Order*, 5 FCC Rcd at 7720, para. 7.

[13] *BOC Safeguards Order*, 6 FCC Rcd at 7576, para. 10, 7624 n.212. The Commission reestablished the conditions for structural relief set forth in the *BOC ONA Amendment Order, i.e.*, that structural separation requirements would be removed for each BOC when it filed a notice stating that: (1) it is technically prepared to offer each of its initial ONA services; (2) federal tariffs for each of its initial ONA services are in effect; and (3) it had filed state tariffs for each of its initial intrastate ONA services. *BOC ONA Amendment Order*, 5 FCC Rcd at 3105, para. 13.

[14] *See BOC ONA Further Amendment Order*, 6 FCC Rcd at 7677. The Commission required the BOCs to submit amendments describing: (1) plans for unbundling Signalling System 7 (SS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN) and generally how those services will fit into the ONA framework, (2) changes to CPNI plans in light of the modifications to CPNI requirements made in the *BOC Safeguards Order*, (3) changes in databases that are password/ID or otherwise restricted from access by BOC enhanced services marketing personnel to reflect the Commission's modified CPNI requirement adopted in the *BOC Safeguards Order*, and (4) CNSs that would be offered as BSEs. In May 1992 the Common Carrier Bureau approved the BOCs' amendments to their CPNI plans implementing changed CPNI requirements made in the *BOC Safeguards Order*. Filing and Review of Open Network Architecture Plans, 7 FCC Rcd 2999 (Com. Car. Bur. 1992).

[15] *BOC ONA Further Amendment Order*, 7 FCC Rcd at 7677-78, Appendix B.

[16] *Id.*

initial ONA services. Those tariffs became effective by February 1992.[17] At the present time, four BOCs have obtained structural relief.[18]

5. In *Computer III*, the Commission determined not to make GTE's participation in the enhanced services market subject to ONA requirements and nondiscrimination safeguards.[19] The Commission concluded that even though GTE resembled a BOC in terms of annual revenues, number of access lines, and exchanges served, the cost of imposing such safeguards on GTE outweighed the benefits at that time.[20] The Commission reasoned that because GTE's service areas are distributed nationwide in a large number of noncontiguous geographic areas, GTE was prevented from exercising monopoly control in large regions of the country, comparable to those served by BOCs.[21] The Commission stated, however, that it stood ready to revisit this issue after ONA was implemented for the BOCs.[22] Previously, in the *Computer II* proceeding, the Commission had determined not to require structural separation for GTE's provision of enhanced services.[23]

III. APPLICATION OF ONA AND NONDISCRIMINATION SAFEGUARDS TO GTE

6. In *Computer III*, we stated that we stood ready to revisit the issue of application of ONA and nondiscrimination safeguards to GTE once implementation of ONA by the BOCs was completed. Because the BOCs are now in the final stages of implementing ONA, it is appropriate to address whether application of ONA and nondiscrimination safeguards to GTE would serve the public interest. We tentatively conclude that the public interest will be served by applying to GTE the same ONA regulatory framework that governs the BOCs' participation in the enhanced services market.[24]

7. By requiring that a carrier make available to ESPs unbundled basic network features and functions, ONA increases opportunities for all ESPs to use a carrier's regulated network efficiently so that they can both expand their markets for their present services and develop new offerings that can better serve the American public.[25] ONA permits ESPs and others to receive specific basic network functions, regardless of whether a carrier's enhanced services utilize those functions. ONA promotes the use of the network in the provision of enhanced services, whether provided by carriers or independent ESPs, thereby increasing the availability of enhanced services and promoting competition in the provision of enhanced services. In addition, as we explained in the *BOC Safeguards Order*, ONA and nondiscrimination safeguards effectively guard against discrimination by the BOCs in the provision of basic services to ESPs. Thus, application of the ONA regulatory framework yields the substantial public interest benefits of broadly protecting against discrimination throughout a carrier's network and actively promoting the efficient provision of enhanced services to the public.[26]

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[17] BOC Open Network Architecture Tariffs, 7 FCC Rcd 1512 (1992) (Ameritech not included); Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, 7 FCC Rcd 257 (1992) (Ameritech's ONA transmittals became effective in December 1991).

[18] *See* Bell Atlantic's Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, 7 FCC Rcd 3877 (Com. Car. Bur. 1992); US West Notice and Petition for Removal of the Structural Separation Requirement and Request for Waiver of Certain State Tariffing Requirements, 7 FCC Rcd 3639 (Com. Car. Bur. 1992); Ameritech Operating Companies Notice and Petition for Removal of the Structural Separation Requirement, 7 FCC Rcd 4104 (Com. Car. Bur. 1992); Southwestern Bell Telephone Company Notice and Petition for Removal of the Structural Separation Requirement and Waiver of Certain State Tariffing Requirements, CC Docket No. 90-623 (Com. Car. Bur., adopted October 29, 1992 and released November 2, 1992). NYNEX Telephone Companies has filed an application for structural relief. This application is pending.

[19] Courts have questioned in the past the FCC's classification of GTE in relation to the BOCs. *See, e.g.*, California v. FCC, 905 F.2d at 1237.

[20] *Phase II Order*, 2 FCC Rcd at 3101-02.

[21] *Id.*

[22] *Id.* at 3073, 3101-02.

[23] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (*Computer II*), *modified on recon.*, 84 FCC 2d 50, 82-83 (*Computer II Reconsideration Order*), *modified on further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd sub nom.*, Computer and Communications Industry Assoc. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

The GTE Consent Decree required GTE to provide information services *via* either a separate subsidiary or a separate division. U.S. v. GTE Corp., 1985-1 Trade Cas. (CCH) ¶ 66,355, section IV (Jan.29, 1985) (GTE Consent Decree); *see* U.S. v. GTE Corp., 603 F.Supp. 730, 742 (D.D.C. 1984) (order authorizing the GTE Consent Decree). However, the decree further provided that if a BOC is permitted to provide a particular information service in a state or an exchange area, the separation obligations of the decree would no longer bind a GTE operating company that offers these same services in the same state or in an exchange area associated with the BOC exchange area. GTE Consent Decree at section V(D)(2). The information services restrictions placed on the BOCs by the Modification of Final Judgment were recently removed. U.S. v. Western Electric Co., Inc., 767 F. Supp. 308 (D.D.C. 1991), *appeal docketed*, No. 91-5263 (D.C. Cir. Aug. 30, 1991), and the court has specifically removed the separation requirement applicable to GTE under the decree for GTE Hawaiian Telephone Company Inc. and GTE Alaska Inc., U.S. v. GTE Corp., No. 83-1298-HHG (D.D.C. Nov. 27, 1991). Accordingly, it appears that the GTE Consent Decree no longer requires GTE to establish a separate subsidiary or division for its provision of information services. The decree also established other requirements, for example, that GTE must give access to their local exchange networks to all information service providers on an equal and nondiscriminatory basis. GTE Consent Decree at section V; *see* 603 F.Supp. at 742. We solicit comment on this analysis and whether other provisions of the decree may affect our proposals herein.

[24] We do not address at this time application of ONA and nondiscrimination safeguards to telephone companies other than GTE.

[25] *BOC ONA Order*, 4 FCC Rcd at 11, para. 2.

[26] *Id.* at 15-16, para. 14.

8. While already a large local exchange carrier, GTE has recently merged with Contel Corporation (Contel), significantly expanding the scope of its operations. This merger added to GTE approximately $3.4 billion in total revenue, 2.7 million additional access lines, and 1700 local exchanges, placing GTE in the position of one of the largest local exchange carriers in the United States by many measures.[27] The new scope of GTE's total operations significantly increases the benefits that it could bring to the public by its conformance with ONA. In particular, with the increased number of exchanges and access lines that it now serves, imposing ONA requirements on GTE will bring substantially more customers the benefits of ONA. The increased scope of GTE's operations and its increased financial strength enhances GTE's ability to participate in the enhanced services market and its ability and incentive to discriminate against competitors. Application of nondiscrimination safeguards to GTE will effectively guard against such discriminatory actions. Accordingly, we tentatively conclude that the application of ONA and nondiscrimination safeguards to GTE would yield substantial public interest benefits by bringing to customers and ESPs operating in GTE's service areas the benefits of ONA, and by safeguarding against discrimination. After the Contel merger, these benefits appear to be substantially greater than when we last examined this issue.

9. At the same time, the Commission and the industry have gained substantial experience with the BOCs' implementation of ONA and nondiscrimination safeguards. This experience, and the measures we are proposing below to streamline and speed the implementation of ONA and nondiscrimination safeguards by GTE, will reduce the costs incurred by GTE, the industry, and the Commission in establishing an ONA environment for GTE. In addition, the scope and strength of GTE's operations, especially following the merger with Contel, give GTE a substantial ability to comply with the ONA requirements and nondiscrimination safeguards.[28]

10. We have previously recognized that GTE differs from the BOCs in that its service areas, many of which are rural, are more widely dispersed. In *Computer III*, we determined that we would not apply ONA and nondiscrimination safeguards to GTE because its service areas were distributed nationwide and mostly noncontiguous. GTE's merger with Contel has increased the extent to which it serves sparsely populated areas.[29] In information submitted informally in advance of this rulemaking, GTE argues that the Contel merger has strengthened the Commission's prior determinations in that GTE is now a more rural and dispersed company and that, therefore, the case is more compelling today not to require it to comply with the ONA requirements and nondiscrimination safeguards.[30] We tentatively conclude that the geographic dispersal of GTE's service areas, and the fact that its operations are comprised to a greater extent of small, rural local exchanges, does not warrant not applying ONA and nondiscrimination safeguards to GTE. While GTE has been more geographically dispersed than any BOC and the Contel merger has made it more so, it is also larger than many of the BOCs by many measures.[31] We tentatively conclude that the benefits that could be achieved in view of its size and resources outweigh the fact that it is geographically dispersed. We solicit comment on this analysis. Based on these considerations, we tentatively conclude that the public interest would be served by imposing ONA requirements and nondiscrimination safeguards on GTE.

11. GTE contends that if the Commission determines to apply ONA and nondiscrimination safeguards to GTE, then the safeguards should be modified to make them less onerous to reflect GTE's many rural, small, local exchange operations. Concerning CPNI, GTE argues that its current internal policies and procedures prevent the inappropriate use of CPNI and that it should not be required to obtain prior authorization from multi-line business customers with more than 20 lines or to provide an annual written notice of CPNI rights to all multi-line business customers, alleging that they are too burdensome generally and especially for its small local exchange operations.[32] Concerning network information disclosure, GTE argues that the Commission's rules should not apply to GTE because it does not engage in the "make/buy" decision and because it already informs all customers of the introduction of new network capability.[33] Concerning nondiscrimination reporting, GTE contends that it should only have to show that it is in compliance with the spirit of the requirement because GTE's internal practices, procedures and systems preclude discrimination.[34] GTE argues that OSS requirements are not appropriate for GTE either because there is insufficient ESP demand to justify the necessary implementing steps.[35] GTE states that it is willing to furnish OSS services where they are justified and to commit to evaluating any *bona fide* request for OSS access using the model ESP input process as defined by the Information Industry Liaison Committee (IILC), and to furnish a response within 120 days. GTE also opposes imposition on it of the reporting requirements applicable to the BOCs as generally being too burdensome.[36]

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[27] *See* FCC Common Carrier Statistics, Table 1.1 (1990/91 ed.); USTA Holding Company Report (1991). According to a recent USTA Holding Company Report, GTE's domestic telephone operations, when compared to the regional BOCs, rank as follows: number of exchanges - first; total operating revenue - second, behind BellSouth Corporation; total gross plant - second, behind BellSouth Corporation; number of employees - second, behind BellSouth Corporation; and number of access lines - fourth, behind Bell Atlantic Corporation, BellSouth Corporation, and Ameritech. USTA Holding Company Report (1992).

[28] GTE has estimated that the cost of implementing nondiscrimination safeguards would be $20 million in the first year. Letter from Carol L. Bjelland, Director-Regulatory Matters, GTE, to Pat Donovan, Attorney, and John Morabito, Attorney, Policy and Program Planning Division, Common Carrier Bureau, FCC, August 28, 1992, at 2 n.2 [hereinafter *GTE Letter*].

[29] Following the Contel merger, GTE provides service in 40 states. The merger added approximately 20% more access lines, but nearly doubled the total service territory. BOC serving areas are three times as densely populated as GTE's areas and cover no more than 39 LATAs, while GTE serves markets that are geographically dispersed across portions of 139 LATAs. In addition, the BOCs serve very large markets including New York, Chicago, Houston, and Los Angeles, whereas GTE serves much smaller markets and has a major presence in only two of the top fifty markets (MSAs). *Id.* at 9-10.

[30] *See supra* note 28.

[31] *See supra* note 27.

[32] *GTE Letter, supra* note 28, at 14 & Attachment G.

[33] *Id.* at 14-15 & Attachment G.

[34] *Id.* at 14 & Attachment G.

[35] *Id.* at 15 & Attachment G.

[36] *Id.* at Attachment G.

12. Given the size and strength of GTE's operations, we tentatively conclude that it has a substantial capacity both to discriminate against competing enhanced service providers and to implement the same nondiscrimination safeguards that are applicable to the BOCs. While it is comprised of smaller local exchanges to a greater extent than the BOCs, some of the BOCs also have a large number of small exchanges and are nonetheless subject to ONA requirements and nondiscrimination safeguards. Accordingly, we are not now persuaded that we should propose to apply a reduced or modified set of ONA requirements and nondiscrimination safeguards to GTE. We seek comment, however, on whether a set of modified requirements such as those suggested by GTE should govern GTE's participation in the enhanced services market. In particular, we seek comment on whether we can, or should, seek to limit application of ONA and nondiscrimination safeguards to particular areas, such as large contiguous service areas. We will incorporate into the record of this proceeding the information that GTE has submitted in advance of this rulemaking, providing other parties an opportunity to comment on GTE's contentions.[37]

13. Accordingly, we propose to make GTE subject to the same ONA requirements and nondiscrimination safeguards applicable to the BOCs. We propose to require that it comply with those requirements and safeguards within twelve months of the date of release of the Report and Order in this rulemaking.[38]

IV. STREAMLINED IMPLEMENTATION

14. Under our proposal today, GTE will be required to comply with the same ONA requirements and nondiscrimination safeguards for participation in the enhanced services market within twelve months from the date a Report and Order in this proceeding is released. The experience gained from the development of ONA and nondiscrimination safeguards for the BOCs should enable us to streamline implementation of ONA and nondiscrimination safeguards by GTE.

A. Initial Offering of ONA Services

15. In *Computer III*, we required the BOCs to justify their initial offerings of ONA services based on the expected market demand, the services' utility as perceived by enhanced services competitors, and technical and costing feasibility.[39] In the *BOC ONA Order*, we carefully reviewed the BOCs' proposed initial ONA service offerings based on this showing. We approved the proposals in part but also required each BOC to compare its offering to other BOCs in an attempt to bring greater uniformity among the BOCs proposed ONA offerings. We approved the BOCs' proposed offerings in the *BOC ONA Amendment Order*.[40] Subsequently, the BOCs filed their ONA tariffs implementing the offering of their approved ONA service proposals. As indicated, the BOCs' ONA tariffs became effective by early 1992.[41]

16. Our lengthy review of the BOCs' initial ONA offerings and ONA tariffs and the implementation of approved BOC ONA service offerings allow us to propose to streamline our review of GTE's initial ONA service offerings. The BOC experience provides substantial guidance to GTE about our standards in evaluating the adequacy of such offerings, and has led to a developed expertise within the Commission in these matters. These factors should dramatically reduce, or even eliminate, the need for the Commission to review GTE's proposed ONA offerings prior to the filing of its ONA tariffs. We thus propose to streamline implementation of GTE's initial ONA offerings by foregoing the sequential ONA process used for the BOCs and instead requiring GTE to file its ONA tariffs at or about the same time that it files for approval of its proposed initial offering of ONA services. We solicit comment on two alternatives for the timing of review of GTE's proposed initial offerings of ONA services and its ONA tariffs: (1) requiring GTE to submit its ONA tariffs and its justification of its initial ONA services at the same time, or (2) requiring GTE to submit its justification of its initial ONA offerings 60 days before filing its ONA tariffs. The first approach would permit a simultaneous review and resolution of common issues that could be raised by GTE's proposed initial ONA offerings and its implementing tariffs; it is less likely to delay the offering to the public of GTE's ONA services. The second approach, on the other hand, could permit a preliminary review of GTE proposed initial offering of ONA services before it files its tariffs.[42] We solicit comment on the relative merits of these approaches.

17. Under either approach, we propose to review GTE's ONA offerings under the standards we applied to the BOCs. Thus, we propose to require that GTE demonstrate that its proposed initial offering of ONA services will adequately meet the needs of ESPs' in its service areas.[43] As we required of the BOCs, we propose to require that GTE provide annual deployment projections for the current year and each of three future years by type of ONA service in terms of percentage of access lines served in GTE's entire territory subject to the ONA regulatory framework and by market area[44] for all proposed interstate and intrastate

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[37] *See GTE Letter, supra* note 28.

[38] Under this proposal, GTE will be subject to, and be required to implement, requirements as they exist twelve months after release of the Report and Order in this proceeding. If this proposal is adopted, these requirements will consist of the complete set of requirements applicable to the BOCs that have been developed in the *Computer III* and remand proceedings, the *BOC ONA Orders*, and future requirements, if any, that the Commission may establish for the BOCs up until twelve months after the date of release of the Report and Order in this proceeding.

[39] *Phase I Order*, 104 FCC 2d at 1065-66, para. 217.

[40] *See BOC ONA Amendment Order*, 5 FCC Rcd at 3104, para. 1.

[41] *See supra* note 17.

[42] Under either approach, for administrative convenience, we would require GTE to submit its justification of its initial offering of ONA services in a separate filing from its ONA tariffs.

[43] Given the guidance provided by the BOCs' implementation of ONA, we encourage, but do not require, GTE to conduct interviews with ESPs in order to ascertain any special needs of ESPs in GTE's service areas.

[44] As used in the BOC ONA plans, the term "market area" generally referred to a contiguous geographic area whose boundaries were delineated by the BOC. A market area encompassed

ONA services, including BSAs, BSEs, CNSs, and ANSs.[45] Under our proposal, GTE will also be subject to all of the annual and semiannual reporting requirements that are applicable to the BOCs. We tentatively conclude that these requirements will assure achievement of our public interest objectives for application of ONA to GTE.

B. Nondiscrimination Safeguards

18. As indicated, over the last six years we have developed a set of nondiscrimination safeguards and requirements that govern the BOCs' provision of enhanced services. In the ONA plan approval process, we have carefully reviewed and approved the method of implementation of nondiscrimination safeguards selected by each of the BOCs. Given that approval, we propose to streamline implementation of nondiscrimination safeguards for GTE by requiring the carrier to implement each of these requirements in a way already approved for one of the BOCs in an ONA plan, unless GTE justifies a different implementation in this rulemaking. This approach will effectively build on the experience gained with the BOCs, streamline the regulatory review process, and speed implementation of nondiscrimination safeguards to GTE by eliminating the need for a separate proceeding after this rulemaking to review GTE's proposed implementation of nondiscrimination safeguards. At the same time, the range of methods used by the BOCs to implement our nondiscrimination safeguards and requirements will afford GTE significant flexibility in implementing our requirements. In addition, GTE can justify a different implementation of safeguards in this rulemaking, thus allowing the Commission to tailor its requirements to any special circumstances. We solicit comments on this proposal.

V. PREEMPTION

19. In the *BOC Safeguards Order*, the Commission preempted state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services. The Commission also preempted state CPNI rules requiring prior authorization that is not required by federal rules and state network information disclosure rules that require initial disclosure at a time different from the federal rule. The Commission did not preempt other state safeguards, but stated that it would review them, if necessary, on a case-by-case basis.[46] The Commission stated that its preemption of state structural separation requirements and state CPNI rules applied to state requirements applicable to AT&T, the BOCs, and independent telephone companies.[47] Those preemptions are fully in effect and prohibit states from requiring structural separation or such a prior authorization requirement for GTE's provision of enhanced services. The Commission also stated, however, that it was not preempting state network information disclosure rules applicable to carriers that are not subject to the federal network information disclosure rule.[48] Accordingly, there is no preemption in effect for state network information disclosure rules that could apply to GTE.

20. In this Notice of Proposed Rulemaking, we propose to apply to GTE the same network information disclosure rule that applies to the BOCs. In the *BOC Safeguards Order*, the Commission stated that its network information disclosure rule seeks to strike a balance between assuring that independent ESPs receive network information on a timely basis and preventing premature disclosure that could impair carriers' service development efforts and inhibit network innovation. The Commission also found that a state rule that required initial disclosure at a time different from the federal rule would negate the federal timing because, by definition, initial disclosure can occur only once. Because we propose to apply the same network information disclosure rule to GTE, state network information disclosure rules that require initial disclosure at a time different from that specified in the federal rule would equally negate the federal timing as it applies to GTE. Accordingly, we propose to preempt state network information disclosure rules applicable to GTE that require initial disclosure at a time different from the timing specified in the federal rule. We solicit comments on this analysis and proposal.

21. In this Notice of Proposed Rulemaking, we have solicited comment on whether we should adopt modified ONA requirements and nondiscrimination safeguards for application to GTE. We additionally solicit comment on what, if any, different preemption of state requirements would be warranted if we adopt modified ONA requirements and nondiscrimination safeguards.

VI. EX PARTE RULES

22. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

VII. REGULATORY FLEXIBILITY ACT

23. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The proposed rule changes apply only to GTE and its affiliated companies that are considered dominant in their field of operation.

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at least one standard metropolitan statistical area (SMSA) (or, in the case of densely populated states, one consolidated statistical area (CSA)), as defined by the United States Census Bureau. The "market area" did not necessarily encompass an entire local access and transport area (LATA). *See BOC ONA Order*, 4 FCC Rcd at 179-80 n.822.

[45] To facilitate review of GTE's proposed initial offering of ONA services and comparison with the ONA services offered by the BOCs, we propose to require that GTE use the generic *ONA Services User Guide* names in its description of its proposed ONA services.

[46] *BOC Safeguards Order*, 6 FCC Rcd at 7630-31. The interrelationship of federal ONA policies and state regulation was extensively considered in the *BOC ONA Order*. There, the Commission decided not to take any preemptive actions with respect to BOC plans for state tariffed ONA services. *BOC ONA Order*, 4 FCC Rcd at 162-64, paras. 309-12.

[47] *BOC Safeguards Order*, 6 FCC Rcd at 7635-36, paras. 129-30.

[48] *Id.* at 7636-37, para. 131.

The Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*

VIII. COMMENT DATES

24. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **February 1, 1993,** and reply comments on or before **March 3, 1993.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any document filed in this docket with the Commission's copy contractor, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

IX. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED THAT, pursuant to Sections 1, 4, 201-205, 215, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, and 218, a NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED to give notice of the proposed regulatory changes described above, and that COMMENT IS INVITED on these proposals.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Contract Tariff F.C.C. No. 43 — Contract Tariff Transmittal No. 93

ORDER

Adopted: November 23, 1992; Released: November 23, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 10, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective November 24, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 43 for AT&T Software Defined Network excluding Network Remote Access, Global Software Defined Network, Accunet Spectrum of Digital Services, Accunet T1.5 Service, Accunet T45 Service, Dataphone Digital Service, and Local Channel Services.

2. On November 17, 1992 Sprint Communications Company L.P. (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 93.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 43, Contract Tariff Transmittal No. 93 and Sprint's petition. We conclude that the filing does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 43, Contract Tariff Transmittal No. 93, filed by Sprint Communications Company L.P. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-262

In the Matter of:

Implementation of Section 3 of the
Cable Television Consumer Protection
and Competition Act of 1992

Tier Buy-Through Prohibitions

NOTICE OF PROPOSED RULE MAKING

Adopted: December 10, 1992; Released: December 11, 1992

Comment Date: January 13, 1993
Reply Comment Date: January 28, 1993

By the Commission:

I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "the Act") became law.[1] Section 3(b)(8) of the Act, which amends Section 623 of the Communications Act of 1934, generally prohibits cable operators from requiring subscribers to purchase any "tier" of service, other than the basic service tier, "as a condition of access to video programming offered on a per channel or per program basis."[2] This is commonly referred to as the "buy-through" prohibition. Section 3(b)(8) specifies certain exceptions and limitations to the prohibition and provides waiver authority to the Commission in certain circumstances. Specifically, §3(b)(8)(B) provides that for a period of 10 years or, if sooner, until a system is modified to eliminate technological impediments to the unbundling of "pay" channels or "pay-per-view" services from other tiers of service, the prohibition shall not apply to a system "that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis. . .." 47 U.S.C. §543(b)(8)(B). The Act also requires that the Commission, within 180 days after enactment (*i.e.*, by April 3, 1993), prescribe regulations to prevent evasions of the provisions relating to the general rate regulation rules, which include the buy-through prohibition. 47 U.S.C. §543(h). With this *Notice* we seek comment on various issues relating to how the Commission can most effectively and efficiently implement the buy-through provisions of the Cable Act of 1992.

2. "Tiering" of nonbasic subscriber programming services became commonplace in the late 1970s.[3] Tiering involves the packaging and sale of channels of programming for separate or incremental charges. Cable systems that offer their services in tiers frequently do so in a cumulative fashion, requiring subscribers to buy-through successive tiers of services in order to subscribe to each higher-tiered service or to a service offered on a per channel or per program basis. Cable system operators generally control access to premium and pay-per-view services by using either addressable or non-addressable technology. Older cable systems using non-addressable technology generally use passive traps (frequency selective filters), non-addressable converters, or non-addressable converter/descramblers. This methodology requires the installation and removal of physical devices (traps or different converters) generally at the subscriber's premises in order to add or delete channels or groups of channels. Newer cable systems using addressable technology have the capability to communicate electronically from their headends to those of its subscribers who have appropriate addressable equipment, such as addressable taps or converters. Consequently, cable systems using addressable technology can make available different levels of cable services electronically, often instantaneously, from their headend. Some cable systems employ a hybrid of addressable and non-addressable technology.

3. The goal of the Act's buy-through prohibition is to foster the ability of subscribers to choose freely among available programming services. The Senate Committee Report states that "[t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire." S. Rep. No. 102-92, 102d Cong., 2d. Sess. (1992) at 77.

II. DISCUSSION

4. *Current Technological Limitations* - Fundamental to any regulation implicating tiering practices of cable system operators is a clear understanding of the technical processes and equipment involved in providing and preventing subscribers' access to individual programs and channels and groups of channels carried on a cable system. Additionally, in order to fashion regulations that are effective without imposing excessive or undue burdens or expense on cable operators or subscribers, we must know the current state of the industry capabilities and the complexity and expense of various levels and kinds of modification.[4] This is particularly relevant in implementing the buy-through prohibition, for we need to know how best to define those cable systems whose "lack of addressable converter boxes or other technological limitations" does not permit them to offer programming on a per channel or per program basis in the manner that the statute seeks to achieve. We note in this regard that the Senate Committee

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 47 U.S.C. §543(b)(8)(A). Other provisions of Section 3 of the Act require the Commission to adopt regulations concerning subscriber rates. These are being addressed in a separate proceeding.

[3] *See Community Cable TV, Inc.*, 95 FCC 2d 1204, 1216 (1983); *Teleprompter Corporation*, 87 FCC 2d 531, 561 n.69 (1981).

[4] In particular, we are interested in the implementation of digital compression technologies which can also be used to increase dramatically the number of channels on a cable system.

Report states that "only about one quarter of all cable systems are addressable, having the technology to isolate all channels." S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992) at 77. Accordingly, we seek information on how widespread various kinds of access-relevant equipment are in cable systems today, and whether and how the existence of particular kinds of equipment generally coincides with other system characteristics.[5]

5. We also seek comment generally on the practical implications of Congress' concern that technological limitations other than the lack of addressable converter boxes could preclude or impede compliance with the Act. Specifically, we seek comment upon the types of equipment or cable system design which would present such technological limitations. For example, how should the buy-through provisions operate in instances in which only one community among several served by the same cable system has addressable capability, or in which various levels of services are offered to different communities or subscribers within a community? Also, we note that certain cable systems employ addressable as well as non-addressable technology. We seek comment upon how such hybrid systems should be treated under the Act's buy-through prohibitions.

6. *Applicability of 10-Year Exception* - The Act gives cable operators, who by reason of non-addressability or other technological limitation cannot comply with the buy-through prohibition, a 10-year period to come into compliance. 47 U.S.C. §543(b)(8)(B). This period is subject to extension by waiver if the Commission determines that compliance would require a cable operator to increase its rates. Commenters may address whether Congress contemplated some minimum effect on rates, under which a waiver would not be appropriate. 47 U.S.C. §543(b)(8)(C). The Act also provides that such exception ceases once the technology utilized by the cable operator's system is improved in a way that eliminates the technological limitation. 47 U.S.C. §543(b)(8)(B)(i). We believe that, under the Act, cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by definition within the scope of the Act's 10-year exemption. We seek comment upon this interpretation. We also seek specific comment on the nature and scope of modifications of such systems which would allow cable operators to comply with the Act's buy-through provisions. In this regard, we seek comment on those instances in which modifications are to be made over a long period of time. For example, in such instances, should the Act's buy-through provisions be applied only to the modified portion of a cable system?[6] Further, are there modifications that are so simple or inexpensive that they can or should be required to be made in accordance with the provisions of this Act?

7. *Definition of "Discrimination Between Subscribers"* - The buy-through restrictions in the Act also prohibit cable operators from "discriminat[ing] between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis." 47 U.S.C. §543(b)(8)(A). The basic service tier is described in the statute as the tier "to which subscription is required for access to any other tier of service." 47 U.S.C. §543(b)(7)(A). Thus, the non-discrimination provisions and the basic tier definition appear to work in tandem to mean that all cable subscribers will, at a minimum, purchase the basic tier; that subscribers purchasing *only* the basic tier are entitled to "buy through" to premium or pay-per-view services without subscribing to intermediate services or tiers of service (*e.g.*, tiers commonly known as "expanded basic"); and that basic tier subscribers who do "buy through" are entitled to the same rate structure for those premium or pay-per-view services as subscribers purchasing intermediate services or tiers. We seek comment on this interpretation of the buy-through provisions. In addition, we seek comment on how, in this context, discrimination might be defined to ensure compliance with this section of the Act and how we would determine that such discrimination has occurred.

8. Related issues arise, furthermore, as systems achieve a higher degree of addressability. Greater addressability may mean --- and, indeed, may be intended by Congress to encourage --- that channels today offered on "expanded basic" tiers are unbundled and offered on a per channel basis. Such a development may implicate the meaning of "discrimination" for purposes of this section of the Act. As systems move toward *a la carte* provision of program services and the number of channels available to a subscriber increases, the marginal utility, or value to the customer, of additional channels may decrease. Additionally, the per channel cost of providing the service may decrease in relation to such fixed costs as plant, equipment, and administration. What pricing schemes would be consistent with the buy-through prohibition restrictions that would permit individual subscriber "customization" of service and that would recognize both the decreasing incremental costs and the marginal utility to the subscriber of additional channels of service? Can multiple channel discounts that are not channel specific be offered without running afoul of the discrimination prohibition?[7] Does this provision permit the offering of multiple, and perhaps overlapping, tiers on a noncumulative basis? We also seek comment on whether, in order to further implement the discrimination provisions of the Act, all subscribers on an addressable system must be provided with addressable converters and, if so, what flexibility cable operators have, consistent with the equipment and rate provisions of the Act, to charge for such equipment.[8]

9. *Waiver of the Buy-Through Provisions* - The Cable Act of 1992 provides the Commission with the authority to grant waivers of the buy-through prohibitions to the extent consistent with the public interest, if enforcement would

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[5] For example, do systems of a certain age, size or density characteristically require individually installed trapping devices or filters to restrict channel access? Are characteristics and technical capabilities relevant to this inquiry generally uniform throughout a franchise area, or throughout a multi-franchise system?

[6] Section 17 of the Act directs the Commission to issue regulations, within 18 months from the date of enactment of the Act (*i.e.* , by April 5, 1994), on methods of assuring compatibility between consumer electronics equipment (*e.g.*, television and VCRs) and cable systems, consistent with the need to prevent theft of cable service. We recognize that these compatibility requirements might affect certain technical aspects of the Act's buy-through prohibition.

[7] For example, could a specific group of channels be offered at a price of $5.00 for one channel, $4.00 for any second channel, $3.00 for any third channel, and so on? Can a subscriber who buys HBO be offered Showtime for a price lower than a subscriber who does not buy HBO?

[8] The Act also indicates that the Commission should act to prevent evasions of the requirements established in Section 3. 47 U.S.C. §543(h). Section 3 of the Act primarily focuses on

cause a cable operator to increase its rates. (47 U.S.C. §543(b)(8)(C).) Subsection B already includes an exception to the prohibition for systems that lack the technical capability to comply, obviating the need for a waiver in such cases during the first ten years after enactment. We seek comment on whether there are other circumstances in which a waiver would be necessary and appropriate either during the Act's initial 10-year period, or in the context of requests for extensions of the 10-year period. We also seek comment on what regulations or guidelines, if any, we should promulgate at this time for evaluating any such waiver request. In addition, we seek comment as to whether new cable systems constructed during the 10-year period of the exception can or must be required to comply with the buy-through prohibition upon construction.

10. *Reduction of Administrative Burdens* - Finally, we note that the Act requires us to design implementing regulations in this area in such a way as "to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers." 47 U.S.C. §543(i). *See also* 138 Cong. Rec. S14,608-09 (daily ed. Sept. 22, 1992) (urging reduced administrative and waiver burdens for small system operators). We seek comment on how this directive can best be accomplished when implementing the buy-through restrictions.

III. ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

11. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally* 47 C.F.R. §§1.1202, 1.1203 and 1.1206(a).

Comment Information

12. Pursuant to applicable procedures set forth in §§1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§1.415 and 1.419, interested parties may file comments on or before January 13, 1993 and reply comments on or before January 28, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

Regulatory Flexibility Act

13. As required by §603 of the Regulatory Flexibility Act, the FCC has prepared an initial Regulatory Flexibility Analysis [IRFA] of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with §603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, Stat. 1164, 50 U.S.C. §§601 *et seq.* (1981)).

Additional Information

14. For further information concerning this proceeding, contact Barrett L. Brick, Cable Television Branch, Video Services Division, Mass Media Bureau (202) 632-7480.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This proceeding is being initiated to seek comments on the best way to implement §3(a) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, relating to prohibitions on buy-through marketing practices.

Objectives

The Commission's goal is to provide notice and opportunity to comment to members of the public regarding efficacious implementations of §3(a) of the new Act.

Legal Basis

Authority for this proposed rule making is contained in §§4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 303(r), and §3(a) of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (1992).

Reporting, Recordkeeping, and other Compliance Requirements

The Commission is asking for comment on what information should be reported and maintained in order to ensure compliance with the Act.

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various rate issues that are being discussed in a separate proceeding. However, to the extent there are distinct issues of evasion specific to the "buy-through" provisions of the Act, parties are invited to comment on them here.

Federal Rules that Overlap, Duplicate, or Conflict with Proposed Rule.

None.

Description, Potential Impact, and Number of Small Entities Involved.

The rules to be developed in this proceeding would impose new burdens on some cable operators, including smaller ones, by requiring them, within ten years, to ensure that their technology enables them to provide programming to subscribers on a per program or per channel basis without requiring the subscriber to buy through intermediate tiers of services. The proceeding does, however, seek comment on how this burden could be mitigated for cable operators serving 1000 or fewer subscribers.

Any Significant Alternative Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

None.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of:

CABLE TELEVISION TECHNICAL AND OPERATIONAL REQUIREMENTS — **MM Docket No. 91-169**

REVIEW OF THE TECHNICAL AND OPERATIONAL REQUIREMENTS OF PART 76, CABLE TELEVISION — **MM Docket No. 85-38**

Petitions for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1992; Released: November 24, 1992

By the Commission:

I. INTRODUCTION

1. On February 13, 1992, the Commission adopted a *Report and Order* in the captioned proceeding, establishing new technical standards for cable television systems.[1] The new standards define the basic technical quality of service cable subscribers are entitled to receive and are applicable to all NTSC video (or similar video channel) downstream signals.[2]

2. Now before the Commission are eight petitions requesting reconsideration or clarification of various aspects of our *Report and Order*,[3] along with nine oppositions[4] and five replies.[5] The issues raised by the petitions fall basically into the following categories: (1) the amplitude characteristic standard; (2) test point requirements; (3) clarification of standards and tests; and (4) federal-local relationships. These issues as well as other miscellaneous issues are discussed in detail below.[6]

II. ENACTMENT OF CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

3. We note that on October 5, 1992, Congress enacted the *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385 Stat. (1992)[Act]. Among the requirements contained in this legislation is that, "within one year after the date of enactment of the [Act], the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality." 47 U.S.C. §544(e). We believe that the present rulemaking proceeding meets this mandate.[7] In passing the Act, Congress codified the right of franchising authorities to seek waivers to impose technical standards which are more stringent than those prescribed by our rules. 47 U.S.C. §544(e). Accordingly, §76.605 of the Commission's Rules shall be amended to reflect this requirement. Further, we note that the Act specifically authorizes franchising authorities to include provisions for enforcement of our technical standards in local franchises.

III. DISCUSSION

The Amplitude Characteristic Standard

4. Among the rules adopted in the *Report and Order* was an amplitude characteristic (also known as frequency response) standard.[8] This standard maintains the relative order of the different components in the television waveform, which will contribute to a higher quality picture. The standard adopted requires that the frequency response be maintained within a range of $\pm$ 2 dB from 0.75 MHz to 5.0 MHz above the lower channel boundary limit. Measurements for testing compliance with this standard are currently to be taken at the subscriber terminal after the signal passes through any cable operator supplied convert-

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[1] *See Report and Order in MM Docket Nos. 91-169 and 85-38*, 7 FCC Rcd 2021 (1992) [*Report and Order*]. The amended rules containing the new standards are published at *Cable Television Technical and Operational Requirements*, 57 FR 11000 (April 1, 1992) (codified at 47 C.F.R. Part 76).

[2] 47 C.F.R. §76.605(a). NTSC [National Television System Committee] video is the television signal standard used in the United States. Downstream signals are signals transmitted from a cable system's headend to subscribers' terminals. Some cable systems disassemble the NTSC video signal during transmission. The disassembled signal is reassembled prior to its delivery to the cable subscriber. Although the reassembled video signal is not considered an NTSC video signal in all respects, it can be received and displayed by NTSC receivers, and is subject to our rules. No standards were adopted for non-NTSC video signals or for HDTV signals. *Report and Order*, 7 FCC Rcd at 2024.

[3] Petitions or joint petitions for reconsideration and/or clarification were filed by Wometco Cable Corp. [Wometco]; Cablevision Systems Corporation [Cablevision]; InterMedia Partners, Prime II Management, L.P., Wometco Cable Corp., Sammons Communications, Inc., and Post-Newsweek Cable [InterMedia]; the National Cable Television Association and the Community Antenna Television Association [NCTA-CATA]; Hughes Aircraft Company, Microwave Communications Products [Hughes-MCP]; the National Association of Telecommunications Officers and Advisors, the National League of Cities, the U.S. Conference of Mayors, and the National Association of Counties [the Local Governments]; Colony Communications, Inc. [Colony]; and Continental Cablevision, Inc. [Continental].

[4] Comments or oppositions to the petitions for reconsideration were filed by O.D. Page, P.E.; Comcast Cable Communications, Inc. [Comcast]; InterMedia; Archer S. Taylor; Buckeye Cablevision, Inc. [Buckeye]; the local Governments; Hughes-MCP; Multivision Cable TV Corp. [Multivision]; and Zenith Electronics Corporation [Zenith].

[5] Reply comments were filed by NCTA-CATA, General Instrument Corporation [GIC], Hughes-MCP, Cablevision and CATA, and InterMedia.

[6] InterMedia also filed a "Motion for Stay" of the effective date of the *Report and Order*. In view of our action today, this motion will be dismissed.

[7] Technical standards for consumer electronics equipment compatibility required under the Act, 47 U.S.C. §544, will be addressed in a future rulemaking.

[8] 47 C.F.R. §76.605(a)(6).

ers.[9] Thus, these measurements include the effects of headend and distribution equipment on the cable system, as well as the converters provided by the cable operator to the subscriber.

5. Most parties seeking reconsideration or clarification of this standard, including the cable industry equipment manufacturers, voice opposition to measuring the amplitude characteristic after a signal passes through a converter. Petitioners state that, based upon the specifications provided by converter manufacturers, almost all cable systems using converters would not be able to comply with this standard. Petitioners state that, in most cases, the cable converter's frequency response alone would border on or exceed the limits of this standard, without any consideration given to the effects of cable headend and distribution equipment. Thus, they state, few, if any, systems would meet this standard, if the combined effects of the cable system and the converters are taken into consideration.

6. In particular, InterMedia states that even if only baseband converters (which appear to be the most problematic in this area)[10] were to be replaced, it would cost the industry in excess of one billion dollars. NCTA-CATA state that for twenty years the Commission maintained an amplitude characteristic standard identical to the new rule, and that the cable industry has always tested this parameter ahead of the cable converter.[11] Archer S. Taylor notes that while modern headend processing equipment is generally capable of substantially exceeding the adopted limits, subscriber set-top converters (which perform many similar functions as a headend processor, but at about 5 percent of its cost) cannot be expected to provide the same performance.

7. NCTA-CATA also contend that on cable systems otherwise meeting the $\pm$ 2 dB amplitude characteristic standard prior to the converter, the effects introduced by converters, as well as impedance mismatches (between a cable system and subscriber-owned video equipment in the home) and over-the-air signal variations, still result in a television signal that is subjectively indistinguishable from a signal that meets the requirements of the rule prior to a converter. Further, NCTA-CATA state that variations from the $\pm$ 2 dB parameter that result from converters will not likely cause problems for consumers, because in most instances existing TV sets have the ability to correct automatically or can be manually adjusted for variations in color rolloff. In this regard, InterMedia states that over-the-air broadcast signals that are subject to multi-path conditions frequently may exhibit in-band variations of 6-8 dB, yet remain subjectively indistinguishable from perfect signals. In further support of their claims, NCTA-CATA and InterMedia provide data showing the minimal subjective effects caused by a higher amplitude characteristic.

8. The Local Governments, in their Petition for Reconsideration, suggest keeping the $\pm$ 2 dB standard, measured after the converter, and further suggest that the relevant bandwidth for measurement of this parameter should be expanded to 0.75 to 5.45 MHz from the 0.75 to 5.0 MHz above the lower channel boundary limit set in §76.605(a)(6) of the Rules. The Local Governments state that this bandwidth expansion is necessary to allow for the evaluation of the performance of the entire NTSC video bandwidth that is routinely processed and passed by the cable headend equipment.

9. The Local Governments also challenge the claims made by cable industry petitioners that compliance with the $\pm$ 2 dB amplitude characteristic measured after a converter would result in the industry spending hundreds of millions of dollars on higher quality converters. The Local Governments allege that cable operators can upgrade many current converters into compliance in a cost efficient manner. The Local Governments also disagree with industry petitioners in regard to the subjective effects of the amplitude characteristic standard. The Local Governments maintain that frequency response across a channel is one of the most important parameters in determining subscriber picture quality and that a poor video response characteristic can result in loss of picture sharpness, changes of color saturation, and blurring of large objects.

10. Our objective throughout this proceeding has been "to establish technical standards which will ensure that cable subscribers receive quality television service on all relevant classes of cable channels." *Report and Order* at 2023. *See also Notice of Proposed Rule Making in MM Docket Nos. 91-169 and 85-38*, 6 FCC Rcd 3673, 3674 (1991) [*NPRM*]. The legislative history of the Act makes plain that Congress had a similar objective in directing the Commission to adopt technical standards for system operation and signal quality.[12] The House, for example, explicitly found that "steps must be taken to ensure that consumers received a cable signal of adequate quality."[13] The amplitude characteristic standard, collectively with other standards, can have a noticeable effect. If we simply amended our rule so that measurements for compliance with this standard were taken prior to a signal's passing through a converter, we would remove from the testing and compliance process a component of cable system equipment -- converters -- that can and does degrade signal quality.[14] We note, too, that proponents of a rule amendment allege, but do not substantiate, the actual number or percentage of converters in use that would fail to comply with our rule. It is our experience that this would not, as commenters allege, be a universal situation for all converters. Further, testing signal quality prior to passage through a converter would create a disincentive for equipment manufacturers to improve the quality of their converters, and cable oper-

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[9] For channels using traps, measurements may be taken before the traps, but a written statement detailing the signal degradation effect of the trap, certified by the system engineer or by the manufacturer of the trap, must be attached to the proof-of-performance record. *Report and Order* at 2027. *See also* paragraph 30, *infra*.

[10] Baseband converters are converters that generally demodulate and remodulate the video signal. *See also* paragraph 23, *infra*.

[11] NCTA-CATA estimate that there are from 20 million to over 30 million converters in use which cannot meet the standard of §76.605(a)(6) of the Rules if measured after the converter.

[12] *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 37-38 (noting subscriber dissatisfaction with reception and picture quality).

[13] *Id.* at 38.

[14] Some cable systems do not use or provide converters to their subscribers. Generally, in such cases, the subscriber owns and maintains either a cable-ready TV set or a cable converter that is compatible with the system, if necessary.

ators would lose the incentive to upgrade their converters relative to this standard.[15] We decline, therefore, to reconsider our decision concerning this standard.

11. Upon careful review of the record, however, we find that industry petitioners raise legitimate concerns regarding potential costs for coming into compliance with §76.605(a)(6) of the Rules by December 30, 1992. Accordingly, some modification of §76.605(a)(6) of the Rules is warranted. Specifically, we shall modify §76.605(a)(6) of the Rules to permit cable operators to measure this standard prior to a signal's passing through a converter for no more than a seven-year period from December 30, 1992, the effective date of the rule. The current recovery period for a converter according to Internal Revenue Service depreciation standards is seven years,[16] and thus even converters put into use today would be depreciated by the end of the period. This seven year phase-in period will allow cable systems to replace converters in a cost-efficient manner. Nevertheless, during this time period, should subscriber complaints arise from a system failing to meet this standard, the cable operator will be required to provide a converter that will allow the system to meet the standard immediately at the complaining subscriber's terminal. Further, should complaints be found to be system-wide, the Commission may order all converters on that system to be changed. We believe that this approach fairly balances all relevant concerns on this issue.[17] Indeed, it is similar to that previously used successfully in *Viacom Cablevision of Wisconsin, Inc.*, 50 RR 2d 1558 (1982), with reference to our aural center frequency standard at that time.[18]

Test Point Requirements

12. In the *Report and Order*, we adopted testing rules requiring that at least six test points be measured within each mechanically continuous set of cables in a system,[19] and establishing a formula that would provide for an adequate number of test locations based upon system subscriber size. *Report and Order* at 2030.

13. Industry petitioners agree with increasing the number of test points based upon population, but they are unanimously opposed to the "mechanically continuous set of cables" portion of the rule. They generally state that this requirement will impose a significant hardship on a number of systems that use microwave to serve subscribers. They also state that the formula for calculating the number of test points adopted by the Commission goes well beyond that proposed by the Joint Agreement,[20] which, they assert, took into consideration microwave systems.

14. Hughes suggests that the added number of test points required by §76.601(c)(1) of the Rules may have the unintentional result of reducing signal quality and reliability by discouraging the use of microwave in favor of less reliable alternatives. InterMedia states that our approach creates a disincentive to serve new, smaller communities. Many towns and unincorporated population pockets are too small to support the construction of an independent headend, but they can be served with the addition of a microwave hub system for about one-fifth of the cost.[21] InterMedia additionally requests that, for cost reasons, the Commission entirely excludes operators of small microwave hubs (*i.e.*, those serving fewer than 1,000 subscribers) from our testing requirements.

15. Several petitioners, including NCTA-CATA, Hughes, and InterMedia, suggest alternative formulae for §76.601(c)(1) of the Rules. These formulae, in general, would retain the portion of the rule that increases the number of test locations for every 12,500 subscribers. However, they would require that only one additional test point be made for each microwave hub or receive site that is technically integrated and serving over 1000 subscribers. InterMedia would define as technically integrated a hub receiving at least 50% of its channels from a common headend, while Hughes suggested at least one test point for every distribution sector (*e.g.*, microwave hub) of the cable system. Hughes defines a distribution sector as a portion of the cable fed from a common RF source. Hughes also defines a common RF source as a location (excluding the subscriber terminal) where 75% or more of the video

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[15] Although NCTA-CATA and others state that, for 20 years, the cable industry has always tested this parameter ahead of the cable converter, the rules during that same period stated that the amplitude characteristic standard is one of the standards to be measured at the subscriber terminal with a matched termination. This means that measurement for this parameter was to be made after the signal passed through the converter.

[16] Rev. Proc. 87-56, 1987-2 C.B. 674.

[17] We note that the House Report to the Act observes: "In considering new standards, the Commission shall require cable operators to comply with the standards it establishes within a reasonable period of time. The Commission should, however, consider permitting reasonable phase-in periods so that operators and ultimately consumers may not unreasonably be required to pay for replacing equipment in place prior to the end of its useful life." H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 109. We also note that §17 of *The Cable Television Consumer Protection and Competition Act of 1992* requires the Commission to issue a rulemaking seeking consumer electronic equipment compatibility. In the context of that rulemaking, the Commission will be examining issues regarding cable system distribution techniques including converters and descrambling equipment in relation to subscriber owned equipment.

[18] We decline the request of the Local Governments that we expand the relevant bandwidth for the amplitude characteristic measurement to 0.75 to 5.45 MHz. This standard, including the relevant bandwidth for measurement, returns to the Commission's earlier requirement of 0.75 MHz to 5.0 MHz above the lower channel boundary (from the *NPRM* 's proposal that frequency response be measured across the entire 6 MHz channel bandwidth, *id.* at 3677), because of design considerations of current systems and some AM fiber optic transmission systems. *Report and Order* at 2027. Additionally, the record in this proceeding generally indicates that measurements in the adopted frequency band would produce satisfactory results on signal quality for this standard.

[19] Areas served by a cable system utilizing nonmechanically continuous sets of cables, such as areas served via microwave receive sites, would each separately have six additional test locations.

[20] An inter-industry proposal for technical standards for cable television systems, filed jointly on October 17, 1991, by the National League of Cities, United States Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, NCTA and CATA, in response to our Notice of Proposed Rulemaking in this Docket.

[21] A microwave hub is generally the microwave receive location from which a cable operator receives most of its programming, which in turn is distributed by cable to subscribers in that community or area.

signals are modulated or the frequency of their carriage within the cable system is changed for the last time prior to delivery to the subscriber tap.

16. The Local Governments' comments generally recognize the concern of the cable industry that the rule as written requires cable operators using microwave transmission technology to "conduct tests at many more points than required to adequately reflect such cable systems' technical performance," and suggest adoption of the Joint Agreement's proposal for testing requirements based only upon subscriber size.

17. We generally find no substantial disagreement with our current requirement that the number of locations for proof-of-performance testing be increased based upon system subscriber counts. That portion of §76.601(c)(1) of the Rules, therefore, which utilizes increments of 12,500 subscribers (or a fraction thereof), will not be modified. With respect to that portion of our rule which requires additional test points based upon system configuration, we remain convinced that tests must be made at each nonmechanically continuous section of the cable plant, because of environmental and geographical factors beyond the cable operator's control that affect the quality of the signal received by the subscriber.[22] At the same time, we also recognize the legitimate concern that cable operators not be burdened by unnecessary testing requirements. Consequently, at least one test point will be required for each portion of a system served by a technically integrated microwave hub. We believe that this approach will satisfy our concerns regarding signal quality for those subscribers being served from microwave receive locations, while reducing the testing burdens on cable operators. For purposes of defining a microwave hub that is technically integrated with a common headend, we believe that reception of 75% or more of the video channels from that headend establishes a clearer demarcation point than that suggested by InterMedia. We note that this standard also delineates which portions of a cable facility comprise a system for purposes of our technical rules. This added certainty will allow the cable industry to comply more readily with other system specific rules, as well as with basic signal leakage performance criteria (CLI) reporting. For reasons stated in the Report and Order,[23] we reject, however, the suggestion that microwave hubs serving fewer than 1000 subscribers on the system be exempted from testing.

18. To ease further the testing burden on operators, we are allowing the required test points for each microwave hub to be counted against the total number of test points required (*i.e.*, the minimum required six tests points and the additional points based upon the number of subscribers), so long as the selected test points include one for each portion of a system served by a hub, and are balanced to represent all geographic areas served. Thus, only cable systems employing six or more technically integrated nonmechanically continuous hub sites will need to conduct tests at seven or more locations independent of additional test points that may be required due to subscriber population. At least one-third of the test points must be representative of subscriber terminals which would experience the worst signal quality degradation on the cable system.[24] Our rules will be adjusted to accommodate the above changes. We also remind cable operators that they are required to comply with all pertinent technical standards at all subscriber terminals. Clarification of Standards and Tests

19. In the *Report and Order,* we required that the vast majority of technical standards be measured by the cable operator at the subscriber terminal (*i.e.*, after the converter, if it is supplied and maintained by the cable operator). However, certain questions have arisen regarding general testing procedures and standards under our new rules.[25] These issues are addressed below.

20. *Location of Testing.* Several commenters, including NCTA-CATA and Zenith, urge that measurements for compliance with our technical standards be made at a subscriber terminal which they propose be defined as a 100-foot drop cable connected to a subscriber's tap, prior to the signal passing through a converter. Zenith asserts that since it is sometimes necessary to shape the in-channel frequency response in order to obtain acceptable picture quality after a signal passes through a converter, measurement at the end of a 100-foot drop would be appropriate.[26]

21. We continue to believe that signal quality measurements made at the end of a 100-foot drop[27] without first passing through a cable subscribers' converter will not

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[22] These factors include atmospheric propagational concerns and recently created obstructions (*e.g.*, newly constructed buildings) within the microwave path that would degrade microwave transmissions.

[23] *See* 7 FCC Rcd at 2033-34. We found therein that technically integrated cable systems with over 1000 subscribers generally have the necessary financial resources to comply with our testing requirements.

[24] Subscriber terminal locations chosen for these test sites shall be the most distant (in terms of cable length) from a system's input or microwave receiver.

[25] The Local Governments request that the Commission adopt a rule prohibiting cable operators that currently exceed the phase-in requirements of our new technical rules -- particularly with respect to the visual signal level to undesired noise ratio (C/N) standard, 47 C.F.R. §76.605(a)(7) -- from being allowed to degrade their systems' performance. We believe it unlikely that cable operators during the rules' phase-in period would purposefully degrade their systems' performance since their systems are designed and are currently operating at levels that would be required in the near future. Further, should a system extend or construct new cable plant during the rules' phase-in period, we expect the system to provide the same quality of service to these areas as the rest of the system currently receives. The Local Governments also request that the Commission adopt a provision to require cable operators to overcome direct pick-up problems. However, direct pick-up problems generally occur within the subscribers' television sets and, thus, may be beyond the control of cable operators. Still, we encourage cable operators to remedy this problem, where possible. *See Report and Order,* 7 FCC Rcd at 2023 n.8, 2032. We will not, however, impose such a requirement on cable operators.

[26] Zenith and GIC further generally object to the inclusion of cable system terminal devices (generally converters) in Part 76 of the Commission's Rules, which comprise our cable television regulations. This issue was addressed in the *Memorandum Opinion and Order in Gen. Docket No. 85-301,* 3 FCC Rcd 6491 (1988), and need not be revisited here. *See also Report and Order* at 2030-2031 n.24. Additionally, the signal quality standards we address today are more appropriately included in Part 76 because cable operators have direct control over the type and quality of converters that they provide and maintain for their subscribers.

[27] We will also specify this measurement in the rules in equivalent metric units in accordance with U.S. governmental policy. *See* 15 C.F.R. §205(b) and *Report and Order* at 2030.

accurately reflect the quality of the signal delivered to the subscriber. *See also* paragraph 10, *supra*. We accordingly will not change our rules in this regard.

22. *Converter Testing*. Cable industry petitioners request that they be allowed to employ a "reference" converter at the end of a 100-foot cable, to alleviate the need to enter subscribers' homes to conduct semiannual system testing.[28] While we believe that, in general, entry into individual homes is not necessary for system-wide testing purposes, we reject the use of one "reference" converter. This technique might not reflect field conditions. For example, cable systems use many cable converters of different manufacture for different service level tiers. They may also use converters of different ages on different portions of their cable systems. Since we are especially interested in the locations on a system that experience the worst degradation, it is necessary to simulate, as much as possible, the actual effects experienced by the subscribers nearby. Consequently, we will require cable operators to conduct system-wide testing which utilizes converters that reflect, as noted above, the types supplied to nearby subscribers.

23. *Visual Level Variations (24-hour tests)*. Cable industry commenters suggest that visual level variation measurements should be made before the input of the converter. They maintain that if measurements are made at the output of the converter, the converter's built-in automatic gain control circuit (AGC) will assure that the output levels do not vary. Thus, measurements after the converter may only show the AGC performance and not the performance of the cable system. We agree. The rules will thus be modified to reflect this change.

24. *Aural Center Frequency*. Cable industry petitioners request that measurements for this standard be made at the headend, and not at both the output of the modulating or processing equipment (generally the headend) and at each test location, as the rules now require. In support, they state that there are generally two types of converters used by the cable industry: radiofrequency (RF) and baseband. The RF converters have little, if any, effect on the aural center frequency; thus, no benefit would be derived from repeated measurements at each test point. Baseband converters, on the other hand, internally generate a subcarrier frequency, which should be exactly the same at all locations if the same make and model of baseband converter is used. In lieu of testing at each test point on baseband converters, petitioners suggest that the Commission accept an attached data sheet based upon manufacturers' specifications derived from frequency stability tests on at least 500 converters or on system tests of at least 50 converters.

25. We are not persuaded by the petitioners' arguments that deleting measurements at each test point would still reflect system performance accurately. There are many different designs and configurations for cable systems, and in certain instances (*e.g.*, FM supertrunking) the frequency carriers within a cable system may be modulated or remodulated at locations within the cable plant between the headend and the subscriber terminal. In those instances, measurements made only at the headend may not accurately reflect this parameter, even when RF converters are used. For reasons similar to those stated in paragraph 22, *supra*, we are rejecting the use of manufacturer's specifications or systems' tests of these converters. Additionally, the cost of performing this test, when it is done concurrently with other required tests, would be minimal for the cable operator.

26. *Aural Carrier Levels*. The *Report and Order* adopted aural carrier levels of between 10 to 17 dB below the associated visual carrier levels, as suggested by many cable industry commenters. However, industry commenters seek further relaxation of this standard for baseband converters. They maintain that the aural carrier level in baseband converters is typically set at 6.5 dB below the associated visual carrier level. This allows for compatibility with over-the-air broadcast specifications since there is no interfering upper adjacent visual carrier present at the output of the converter. We are convinced by the petitioners that relaxation of the aural carrier level for baseband converters to a range between 6.5 and 17 dB below the associated visual carrier level will have little, if any, impact on signal quality. Therefore, the rules will be modified to reflect the requested change for baseband converters.

27. *Noise and Distortion*. Intermedia and several other petitioners suggest that testing of noise and distortion through a converter is less accurate than testing at the output of system amplifiers because, at times, added amplification may be needed to accommodate for some test equipment. They suggest that tests for noise and distortion be made at the output of the last cable system amplifier with the results added to the calculated degradation caused by cable converters. However, the use of calculated degradation may not account for field conditions. We accordingly are not persuaded that this suggestion will result in an accurate reflection of service actually provided to subscribers. *See also* paragraphs 22 and 25, *supra*.

28. *Hum Modulations (Hum)*. In the *Report and Order*, we adopted a requirement that at least four channels be tested for hum. Industry commenters state that this testing requirement is excessive and would be disruptive to subscribers. In support, they state that hum generally results from inadequate supply voltage or a power supply component failure. Therefore, they maintain that it tends to affect all channels equally. For those situations in which hum originates from the headend modulator or processor, the commenters state that the resultant hum is of such magnitude that viewers system-wide would complain. Additionally, to test properly for hum, operators must shut off the video portions of all channels that are being tested. Therefore, they suggest that the Commission only require the testing of one channel for hum at each test location. They further suggest that if the Commission is persuaded to require that only one channel be tested for hum, then only

[28] InterMedia incorrectly claims that our rules allow the use of a reference converter to be moved from test point to test point, and contends that calculating the average effects of all converters in use at the system being tested, and adding the degradation of the converters to the measured results of the system at a point before the converter, would be more accurate. We have never condoned the use of a reference converter, shuffled back and forth, between the required test points. Rather, we clearly stated that "[t]he measurements may be taken at convenient monitoring points in the cable network: *Provided*, that data shall be included to relate the measured performance of the system as viewed from a nearby subscriber terminal . . . ." 47 C.F.R. §76.601(c)(1). If different converters are used by the system at subscriber terminals, different converters are needed for tests at the test points.

a single unmodulated carrier should be sufficient (since only a single channel need be tested) to demonstrate compliance with this parameter. This allows minimum disruption to viewers and the use of less expensive equipment (*e.g.*, certain signal level meters) to demonstrate compliance.

29. We are persuaded by petitioners' concerns, especially since adopting petitioners' suggestions would diminish disruption to subscriber services without undermining the purpose of the rule. Consequently, we will only require that one channel be measured for hum at each test point, and that a single unmodulated carrier be allowed to be used to demonstrate compliance. However, should subscriber complaints arise from this standard, cable operators will be required to perform a hum test containing the requisite number of channels at the complainant subscriber terminal location. *See* 47 C.F.R. §76.601(c)(2). Further, should the problem be found to be systemic, the Commission may order that the requisite number of channels be tested at all required measurement locations. Again, this approach is similar to that which we adopt today for testing for the amplitude characteristic. *See* paragraph 11, *supra*. Nevertheless, we remind cable operators that all technical standards are expected to be met for all channels at all subscriber locations.

30. *Traps*. Several petitioners seek clarification of our rules regarding traps[29] and their effects on upper adjacent channels. Industry petitioners request that they be allowed to remove traps when measurements are made. As we stated in the *Report and Order*, 7 FCC Rcd at 2031, for system operators using traps or similar devices on specific channels, tests for those channels may be made before the trap. However, a statement detailing the effects of these devices on the trapped channel and, if necessary, on the adjacent channels must be attached to each of the cable operator's proof-of-performance records. Consequently, if these requirements are followed, we see no reason why traps may not be removed within the scope of the present rule.

31. *Color Measurements*. Several petitioners request the Commission to clarify that color measurements are only to be made at the output of the modulating or processing equipment (generally the headend) of the system. This was our intent in the *Report and Order*, and we will adjust the rule to end any uncertainty.

32. *Co-Channel Interference*. The Local Governments suggest that the "Commission reinstitute a headend co-channel interference standard in its rules.[30] They allege that when such interference occurs degradation can be so severe as to make reception unviewable. Headend co-channel interference is a phenomenon over which the cable operator generally has very little control because of geographic, atmospheric, and environmental conditions that affect the propagation of over-the-air television signals. We stated in the *Report and Order*, 7 FCC Rcd at 2024, that we will not require cable operators to take extraordinary measures to improve upon signals over which they have no control. We further stated, however, that we do expect cable operators to make reasonable efforts to ensure signal quality, and to use good engineering practices and proper equipment in the processing of each signal. We believe that these two factors best address co-channel interference questions, and consequently we will not adopt specific rules regarding this subject.

Federal-Local Relationships

33. Various parties have raised issues concerning federal-local relationships in the context of our rules. Essentially, the issues raised relate to three areas: whether the rules' complaint resolution process violates the subscriber privacy guarantee of the Communications Act, the role of franchising authorities in enforcing signal leakage requirements, and franchising authorities' ability to require additional testing.

34. *Subscriber Privacy*. InterMedia and Comcast suggest that, because the complaint resolution process requires the maintenance of subscriber complaint records for one year and for their inspection by the Commission and by local franchising authorities, §76.607 of the Rules may be in conflict with §631 of the Communications Act.[31] This portion of the Act precludes the collection and disclosure of "personally identifiable information" without a subscriber's prior consent.

35. The Local Governments maintain that §631 of the Communications Act is not applicable to the complaint resolution process. The Local Governments assert that industry commenters merely speculate about the provision's applicability and note that the Act allows a cable operator to disclose personally identifiable information if such disclosure is "necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber . . . ."[32] This would include, the Local Governments contend, the resolution of subscriber complaints concerning signal quality.

36. In reply, InterMedia notes that §76.607 of the Rules could be interpreted to allow both local and federal officials to request access to personally identifiable information, such as the specific cable channels to which an individual subscribes. This could be avoided, suggests InterMedia, by providing statistical information on complaints, as opposed to information on individual customers.

37. As adopted in the *Report and Order* in this proceeding, §76.607 of the Rules requires each system operator to "establish a process for resolving complaints from subscribers about the quality of the television signal delivered." It further provides that the records associated with this process shall "be available for inspection by the Commission and franchising authority, upon request." However, §631 of the Cable Act, with certain exceptions, states that system operators may "not disclose personally identifiable information concerning any subscribers." We agree with InterMedia and Comcast that this creates an apparent conflict that needs to be resolved.

38. Exceptions to the nondisclosure provisions of §631 include:

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[29] A trap is an inexpensive filter generally used to control the delivery of a premium service.

[30] Co-channel interference occurs when the desired signal and one or more other signals are arriving at the cable operator's headend antenna at the same time. It is a phenomenon that may, at times, be cured by the use of directionalized receiving antennas.

[31] 47 U.S.C. §551.

[32] 47 U.S.C. §551(c)(2)(A).

(1) *Specific Consent:* where there is "prior written or electronic Zconsent of the subscriber concerned," (47 U.S.C. §551(c)(1));

(2) *Legitimate Business Purpose:* where "necessary to render, or conduct a legitimate business activity related to cable service. . .", (47 U.S.C. §551(c)(2)(A));

(3) *Court Order:* where the disclosure is to a "governmental entity" pursuant to a proper court order, (47 U.S.C. §551(c)(2)(B)); and

(4) *Negative Consent to Limited Disclosure:* the disclosure is only of the name and address of a subscriber to any cable service and that subscriber has been provided the opportunity to prohibit disclosure. (47 U.S.C. §551(c)(2)(C)).

39. While the application of the law to subscriber complaints received by a cable operator is not entirely clear, the law does reflect the high priority that Congress has accorded to maintaining the privacy of information regarding the viewing and subscribing habits of cable consumers.[33] Assuming that the statute does cover information collected through the complaint process, none of the disclosure exceptions appear to be clearly applicable.[34] In any event, we believe an effort should be made to accommodate both privacy concerns and technical standards compliance. We will therefore require cable operators to provide both this Commission and local franchise authorities with aggregate data[35] on complaints rather than individual complaints containing personally identifiable information of the type restricted from system operator disclosure. Both the Commission and local governments will, of course, have available complaints that they receive directly. In addition, if necessary, procedures can be established for seeking the consent of subscribers to a broader disclosure of individual complaints. It seems unlikely that significant numbers of subscribers would, upon request, object to the release of complaints addressing picture quality or technical standards compliance.[36]

40. *Signal Leakage Enforcement.* Wometco and InterMedia express concern that the new rules unintentionally delegate authority to state and local authorities to enforce the Commission's signal leakage standard. Both petitioners urge the Commission to clarify that this was not the Commission's intent.

41. In opposition, the Local Governments argue that "[f]ranchising authorities must have the power to determine compliance with the Commission's rules, given that signal leakage by a cable system raises serious public safety concerns."

42. In reply, NCTA-CATA and InterMedia state that signal leakage standards do not govern the quality of signals provided to subscribers and hence do not fall within the purview of franchising authorities' responsibilities under the new rules. In addition, NCTA-CATA note that the Commission clearly stated that the *Report and Order* "merely updates the language of [the existing] rules," *id.* at 2031 n.24. No intent was expressed to give local franchising authorities signal leakage enforcement responsibilities.

43. NCTA-CATA and InterMedia are correct in noting our consistent intent simply to update the language of our signal leakage rules without giving local franchising authorities new, shared responsibilities for signal leakage enforcement. *Report and Order* at 2030-2031 n.24; *NPRM* at 3679 n.26. We reiterate this intent, and will clarify our rules accordingly.[37]

44. We further note that the Commission remains active in its vigorous enforcement of the cable signal leakage rules. In this regard, during the period from July 1991 through June 1992, the Commission assessed forfeitures totalling $128,000, while at the same time issuing orders to terminate operations on aeronautical frequencies where appropriate. While we are not relinquishing our signal leakage enforcement authority to local governments, we of course welcome any information from local governments concerning signal leakage problems to aid our enforcement efforts in this area. This is especially true because signal leakage may have an ancillary effect on signal quality.

45. *Additional Testing.* Several industry petitioners and commenters voice their concern that local franchising authorities should not be permitted to demand additional testing by cable operators, pursuant to §76.601(d) of the Rules, at will. Rather, these parties argue, such retesting should be circumscribed by demonstrated need. Wometco and InterMedia urge limiting such additional testing to

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[33] Section 631 does not create any clear distinction between various types of information a system operator might collect. The legislative history at one point indicates that the law is applicable "to all individually identifiable information collected by a cable operator *over the cable system*. . ." H.R. Rep. No. 934, 98th Cong., 2d Sess. 76 (1984) (emphasis added). However, it also indicates that the privacy provisions provide the subscriber with "the opportunity to limit disclosure of his name and address", which is information that would not be collected over the cable system. *Id.*

[34] We believe the Local Governments' argument that subscriber complaints may be disclosed under the legitimate business activity exception may be too broad. Including regulatory compliance within the "legitimate business activity" exception might negate the separate court order requirement that would otherwise limit governmental access to this type of information. This does not appear to have been intended.

[35] For purposes of §631, personally identifiable information does not include "any record of aggregate data which does not identify particular persons." 47 U.S.C. §551(a)(2).

[36] As noted in paragraph 3, Congress recently enacted *The Cable Television Consumer Protection and Competition Act of 1992* which incorporated privacy provisions amending §631. These new amendments essentially reiterate the privacy provision's of §631. Consequently, we believe no change to our above policy findings regarding the complaint process is now warranted. In addition, Cablevision supported by CATA, claims that the requirement of §76.607 of the Rules that cable operators advise their subscribers annually of the cable operators' complaint resolution process, "including the address of the responsible officer of the local franchising authority," is too burdensome a task for some operators, such as Cablevision, some of whose integrated systems may be subject to regulation by as many as 70 separate franchising authorities. The Local Governments deny that this is typical of cable systems across the country, and argue that the Commission's waiver process obviates any need to modify the rule. We agree with the Local Governments, and we are not convinced that this rule imposes a burden, if any, that is greater than, for example, billing subscribers and providing subscribers with financial information on fee assessments particular to their community.

[37] We understand that some confusion may have arisen from typographical errors in the numbering of the new rules in the Federal Register. Our clarification will correct these errors.

specific locations based upon specific evidence of noncompliance. InterMedia also suggests that a pre-test notification period be required.

46. In opposition, the Local Governments contend that there should be no significant limits on the ability of franchising authorities to order additional proof-of-performance tests. At the same time, the Local Governments recognize that they and NCTA-CATA, in the Joint Agreement and in a supplemental filing, recommended some limitations on franchising authorities' ability to request arbitrary testing. These limitations included thirty days' notice to a cable operator, to allow the operator to demonstrate that it is in fact in compliance with the Commission's Rules, which notice should include:

> a description of signal quality problem(s) causing [the franchising authority] to believe that the cable system is not in compliance, as well as any other information, if any, that the franchising authority believes would enable the cable operator to determine the standard(s) with which the cable system may not be in compliance.

The Local Governments note that they would not object to these limitations on their rights to require testing pursuant to §76.601(d) of the Rules but would oppose any additional limitations. In reply, InterMedia notes that it is not opposed to the limitations on retesting previously agreed to by the Local Governments and NCTA-CATA as an alternative to InterMedia's own proposal.

47. As the rule in question states, "additional tests, repeat tests, or tests involving specified subscriber terminals may be required by the Commission or the local franchiser to secure compliance with the technical standards." 47 C.F.R. §76.601(d). Indeed, this is the identical language originally proposed by the Commission in the *NPRM* at 3681. The intent of the rule is to secure compliance. As with all of our technical rules, it is "crafted to resolve problems and improve service to subscribers in [the delivery of signals]," *Report and Order* at 2023, and performance tests conducted by cable operators must "offer reasonable assurance that the system is performing in such a manner as to achieve our goal of quality service." *Id.* at 2030. Given that general system performance tests will be conducted semiannually,[38] it was not and is not our intent that additional testing required by franchising authorities be generic, but rather that it be directed toward resolving specific problems and instances of noncompliance. We agree, therefore, with the Local Governments and with InterMedia that cable operators should be notified by franchising authorities of any perceived signal quality problems which need to be corrected, and that operators then should be afforded thirty days to come into compliance prior to retesting. Given the general agreement on this issue among commenting parties, we again decline to adopt rules in this area but will specify our intent in a new note to existing §76.601(d) of the Rules.

IV. CONCLUSION

48. In crafting new technical standards for cable television systems, we have attempted to enable both this Commission and local franchising authorities to meet applicable statutory responsibilities, and to ensure the provision of quality cable service to the public without unnecessarily burdening cable operators. *Report and Order* at 2035. We believe that we have retained this balance on reconsideration, adjusting the rules only where necessary to achieve these goals in a fashion consistent with the public interest.

V. PROCEDURAL MATTERS

49. The modifications and revisions we are adopting here to the rules promulgated by our *Report and Order* have not changed our Final Regulatory Flexibility Analysis which was set forth in the *Report and Order* at 2035-2036. $ &No parties have requested reconsideration of this Analysis. Accordingly, IT IS ORDERED, THAT, Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix.

50. IT IS FURTHER ORDERED, THAT the petitions for reconsideration and/or clarification ARE GRANTED to the extent indicated herein, and in all other respects ARE DENIED.

51. IT IS FURTHER ORDERED, That the "Motion for Stay", filed by InterMedia Partners, *et al.* IS DISMISSED.

52. IT IS FURTHER ORDERED, THAT the amendments to the Commission's Rules and Regulations ARE EFFECTIVE on December 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. Section 76.5 is amended by adding paragraph (kk) to read as follows:

§ 76.5 Definitions.

* * * * * *

(kk) Technically Integrated. Having 75% or more of the video channels received from a common headend.

[38] 47 C.F.R. §76.601(c).

* * * * *

2. Section 76.601 is amended by revising paragraph (c) and by adding a note to read as follows:

§ 76.601 Performance tests.

* * * * *

(c) * * *

(1) For cable television systems with 1000 or more subscribers but with 12,500 or less subscribers, proof-of-performance tests conducted pursuant to this section shall include measurements taken at six (6) widely separated points. However, within each cable system, one additional test point shall be added for every additional 12,500 subscribers or fraction thereof (*e.g.*, 7 test points if 12,501 to 25,000 subscribers; 8 test points if 25,001 to 37,500 subscribers, *etc.*). In addition, for technically integrated portions of cable systems that are not mechanically continuous (*i.e.*, employing microwave connections), at least one test point will be required for each portion of the cable system served by a technically integrated microwave hub. The proof-of-performance test points chosen shall be balanced to represent all geographic areas served by the cable system. At least one-third of the test points shall be representive of subscriber terminals most distant from the system input and from each microwave receiver (if microwave transmissions are employed), in terms of cable length. The measurements may be taken at convenient monitoring points in the cable network: Provided, that data shall be included to relate the measured performance of the system as would be viewed from a nearby subscriber terminal. An identification of the instruments, including the makes, model numbers, and the most recent date of calibration, a description of the procedures utilized, and a statement of the qualifications of the person performing the tests shall also be included.

(2) Proof-of-performance tests to determine the extent to which a cable television system complies with the standards set forth in § 76.605(a)(3), (4), and (5) shall be made on each of the NTSC or similar video channels of that system. Unless otherwise as noted, proof-of-performance tests for all other standards in § 76.605(a) shall be made on a minimum of four (4) channels plus one additional channel for every 100 MHz, or fraction thereof, of cable distribution system upper frequency limit (*e.g.*, 5 channels for cable television systems with a cable distribution system upper frequency limit of 101 to 216 MHz; 6 channels for cable television systems with a cable distribution system upper frequency limit of 217-300 MHz; 7 channels for cable television systems with a cable distribution upper frequency limit of 300 to 400 MHz, *etc.*). The channels selected for testing must be representative of all the channels within the cable television system.

(3) * * *

(4) The operator of each cable television system shall conduct triennial proof-of-performance tests of its system to determine the extent to which the system complies with the technical standards set forth in § 76.605(a)(11).

* * *

Note: Prior to requiring any additional testing pursuant to § 76.601(d), the local franchising authority shall notify cable operator who will be allowed thirty days to come into compliance with any perceived signal quality problems which need to be corrected. The Commission may request cable operators to test their systems at any time.

3. Section 76.605 is amended by revising paragraph (a), by revising Note (2), and by adding Notes (3), (4) and (5) to read as follows.

§ 76.605 Technical Standards.

* * *

(a) * * *

(3) The visual signal level, across a terminating impedance which correctly matches the internal impedance of the cable system as viewed from the subscriber terminal, shall not be less than 1 millivolt across an internal impedance of 75 ohms (0 dBmV). Additionally, as measured at the end of a 30 meter cable drop that is connected to the subscriber tap, it shall not be less than 1.41 millivolts across an internal impedance of 75 ohms (+3 dBmV). (At other impedance values, the minimum visual signal level, as viewed from the subscriber terminal, shall be the square root of 0.0133(z) millivolts and, as measured at the end of a 30 meter cable drop that is connected to the subscriber tap, shall be 2 times the square root of 0.00662(z) millivolts, where Z is the appropriate impedance value).

* * * *

(4) The visual signal level on each channel, as measured at the end of a 30 meter cable drop that is connected to the subscriber tap, shall not vary more than 8 decibels within any six-month interval which must include four tests performed in six-hour increments during a 24-hour period in July or August and during a 24-hour period in January or February, and shall be maintained within:

* * *

(5) The rms voltage of the aural signal shall be maintained between 10 and 17 decibels below the associated visual signal level. This requirement must be met both at the subscriber terminal and at the output of the modulating and processing equipment (generally the headend). For subscriber terminals that use equipment which modulate and remodulate the signal (*e.g.*, baseband converters), the rms voltage of the aural signal shall be maintained between 6.5 and 17 decibels below the associated visual signal level at the subscriber terminal.

(6) The amplitude characteristic shall be within a range of $\pm$ 2 decibels from 0.75 MHz to 5.0 MHz above the lower boundary frequency of the cable television channel, referenced to the average of the highest and lowest amplitudes within these frequency boundaries.

(i) Prior to December 30, 1999, the amplitude characteristic may be measured after a subscriber tap and before a converter that is provided and maintained by the cable operator.

(ii) As of December 30, 1999, the amplitude characteristic shall be measured at the subscriber terminal.

* * *

(10) The peak-to-peak variation in visual signal level caused by undesired low frequency disturbances (hum or repetitive transients) generated within the system, or by inadequate low frequency response, shall not exceed 3 percent of the visual signal level. Measurements made on a single channel using a single unmodulated carrier may be used to demonstrate compliance with this parameter at each test location.

(11) As of June 30, 1995, the following requirements apply to the performance of the cable television system as measured at the output of the modulating or processing equipment (generally the headend) of the system:

(i) The chrominance-luminance delay inequality (or chroma delay), which is the change in delay time of the chrominance component of the signal relative to the luminance component, shall be within 170 nanoseconds.

(ii) The differential gain for the color subcarrier of the television signal, which is measured as the difference in amplitude between the largest and smallest segments of the chrominance signal (divided by the largest and expressed in percent), shall not exceed $\pm$ 20%.

(iii) The differential phase for the color subcarrier of the television signal which is measured as the largest phase difference in degrees between each segment of the chrominance signal and reference segment (the segment at the blanking level of 0 IRE), shall not exceed $\pm$ 10 degrees.

(12) As an exception to the general provision requiring measurements to be made at subscriber terminals, and without regard to the type of signals carried by the cable television system, signal leakage from a cable television system shall be measured in accordance with the procedures outlined in § 76.609(h) and shall be limited as follows:

* * *

(b) * * *

* * *

Note 2: For systems serving rural areas as defined in § 76.5, the system may negotiate with its local franchising authority for standards less stringent than those in §§ 76.605(a)(3), 76.605(a)(7), 76.605(a)(8), 76.605(a)(10) and 76.605(a)(11). Any such agreement shall be reduced to writing and be associated with the system's proof-of-performance records.

Note 3: Should subscriber complaints arise from a system failing to meet § 76.605(a)(6) prior to December 30, 1999, the cable operator will be required to provide a converter that will allow the system to meet the standard immediately at the complaining subscriber's terminal. Further, should the problem be found to be system-wide, the Commission may order all converters on the system be changed to meet the standard.

Note 4: Should subscriber complaints arise from a system failing to meet § 76.605(a)(10), the cable operator will be required to remedy the complaint and perform test measurements on § 76.605(a)(10) containing the full number of channels as indicated in § 76.601(c)(2) at the complaining subscriber's terminal. Further, should the problem be found to be system-wide, the Commission may order the full number of channels as indicated in § 76.601(c)(2) be tested at all required locations for future proof-of-performance tests.

Note 5: A franchising authority may apply to the Commission for waiver to impose cable technical standards that are more stringent than the standards prescribed by the Commission.

4. Section 76.607 is to be revised as follows:

§ 76.607 Resolution of Complaints.

Cable system operators shall establish a process for resolving complaints from subscribers about the quality of the television signal delivered. These records shall be maintained for at least a one-year period. Aggregate data based upon these complaints shall be made available for inspection by the Commission and franchising authorities, upon request. Subscribers shall be advised, at least once each calendar year, of the procedures for resolution of complaints by the cable system operator, including the address of the responsible officer of the local franchising authority.

Note: Prior to being referred to the Commission, complaints from subscribers about the quality of the television signal delivered must be referred to the local franchising authority and the cable system operator.

* * * * *

5. Section 76.609 is to be amended to revise paragraph (h)(2) to read as follows:

§ 76.609 Measurements.

* * * * *

(h)(2) Field strength shall be expressed in terms of the rms value of synchronizing peak for each cable television channel for which signal leakage can be measured.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

In re Application of

ALGREG CELLULAR ENGINEERING File No. 10607-CL-P-307-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin

In re Application of

CRANFORD CELLULAR COMMUNICATIONS File No. 10611-CL-P-311-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne

In re Application of

NEW-ERA CELLULAR TELE-COMMUNICATIONS File No. 10563-CL-P-332-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 332, Arkansas 9 - Polk

In re Application of

BAY CELLULAR OF FLORIDA File No. 10754-CL-P-497-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497, Mississippi 5 - Washington

In re Application of

FLORIDA CELLULAR File No. 10445-CL-P-505-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505, Missouri 2 - Harrison

In Re Application of

A-1 CELLULAR COMMUNICATIONS File No. 10454-CL-P-514-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514, Missouri 11 - Moniteau

In re Application of

BRAVO CELLULAR File No. 10673-CL-P-579-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579, North Carolina 15 - Cabarrus

In re Application of

TNT COMMUNICATIONS File No. 10233-CL-P-582-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 582, North Dakota 3 - Barnes

In re Application of

ALPHA CELLULAR File No. 10909-CL-P-586-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 586, Ohio 2 - Sandosky

In re Application of

CEL-TEL COMMUNICATIONS File No. 10912-CL-P-589-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589, Ohio 5 - Hancock

In re Application of

EJM CELLULAR PARTNERS File No. 10567-CL-P-596-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596, Oklahoma 1 - Cimarron

In re Application of

PINELLAS COMMUNICATIONS File No. 10808-CL-P-613-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613, Pennsylvania 2 - McKean

In re Application of

CENTAUR PARTNERSHIP File No. 10720-CL-P-631-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631, South Carolina 7 - Calhoun

In re Application of

SIGNAL CELLULAR COMMUNICATIONS File No. 10721-CL-P-632-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632, South Carolina 8 - Hampton

In re Application of

A-1 CELLULAR COMMUNICATIONS File No. 10409-CL-P-661-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661, Texas 10 - Navarro

In re Application of

EJM CELLULAR PARTNERS File No. 10116-CL-P-721-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4 - Niobrara

In re Application of

TNT COMMUNICATIONS File No. 10678-CL-P-727-A-89

For facilites in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 727, Puerto Rico 5 - Ceiba

In re Application of

SATELLITE CELLULAR SYSTEMS — File No. 10037-CL-P-318-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318, Arizona 1 - Mohave, for Station KNKN 268

In re Application of

JAYBAR COMMUNICATIONS — File No. 10042-CL-P-323-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6 - Graham, for Station KNKN 251

In re Applications of

DATA CELLULAR SYSTEMS — File No. 10029-CL-P-345-A-88
File No. 07080-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345, California 10 - Sierra, for Station KNKN250

In re Applications of

CELLULAR PACIFIC — File No. 10031-CL-P-346-A-88
File No. 06606-CL-MP-90
File No. 06688-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 346, California 11 - El Dorado, for Station KNKN 252

In re Application of

NORTH AMERICAN CELLULAR — File No. 10066-CL-P-388-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388, Idaho 1 - Boundary, for Station KNKN 253

In re Applications of

ALPHA CELLULAR — File No. 10318-CL-P-410-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 - Brown, for Station KNKN 340

For assignment of — File No. 10318-CL-P-410-A-88
Station KNKN 340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 RSA.

In re Application of

ALEE CELLULAR COMMUNICATIONS — File No. 10074-CL-P-555-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555, New Mexico 3 - Catron, for Station KNKN 271

In re Application of

CRYSTAL COMMUNICATION SYSTEMS — File No. 10078-CL-P-606-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606, Oregon 1 - Clatsop, for Station KNKN 309

APPEARANCES

David Kaufman, Robin Neitert, Loretta K. Tobin, Stephen Coran and *Stephen Kafee* on behalf of Algreg Cellular Engineering; *John P. Bankson, Jr., Neal M. Goldberg, Joe Dickson Edge, Sue W. Bladek* and *Elizabeth A. Marshall* on behalf of Cranford Cellular Communications, New-Era Cellular Tele-Communications, Bay Cellular of Florida, A-1 Cellular Communications, TNT Communications, Cel-Tel Communications, EJM Cellular Partners, Pinellas Communications, Centaur Partnership, Jaybar Communications, Alee Cellular Communications; *David L. Hill, Audrey P. Rasmussen,* and *Andrew Erlich* on behalf of Signal Cellular Communications, Satellite Cellular Systems, Data Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications Systems; *Larry S. Solomon,* and *Dan J. Alpert* on behalf of Florida Cellular and Bravo Cellular; *Alan Y. Naftalin* and *Herbert D. Miller, Jr.,* on behalf of Alpha Cellular; *Clifford M. Harrington, Eliot Greenwald, Kathryn R. Schmeltzer,* and *Scott Flick* on behalf of Applicants Against Lottery Abuse; *Carl W. Northrop, Rosemary T. Rakas,* and *Rebecca L. Dorch* on behalf of the Committee For a Fair Lottery, and Thomas Domencich; *Richard S. Myers* on behalf of Buckhead Cellular Communications Partnership; *James F. Ireland III, John Davidson Thomas* and *Francis Chetwynd* on behalf of Cellular Applicants Coalition; *Donald Evans, James Kline,* and *Donald Douglas* on behalf of Miller Communications, Inc. and Skywave Partners, Inc.; *Peter Gutmann, Louise Cybulski,* and *William J. Bowman* on behalf of Pepper and Corrazini; *Hugh Taylor* and *William Zimsky* on behalf of ZDT Partnership; *Mark Fox Evens* and *Michael Maroney* on behalf of witness Eric Leong; and *Carmen Borkowski, Gerald Zuckerman, Joseph Weber* on behalf of Chief, Common Carrier Bureau (FCC).

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: November 19, 1992; Released: December 22, 1992

TABLE OF CONTENTS

TOPICS	Findings of Fact	PARAGRAPHS
Introduction		F 1-11
Background		F 12-79
A-1 Cellular Communications		F 80-111
Cranford Cellular Communications		F 112-113
New Era Cellular Tele-Communications		F 151-201
Alee Cellular Communications		F 202-232
Cel-Tel Communications		F 233-256
Algreg Cellular Engineering		F 257-271
Jaybar Communications		F 272-298
Pinellas Communications		F 299-325
Florida Cellular		F 326-344
Bay Cellular of Florida		F 345-369
Centaur Partnership		F 370-402
EJM Cellular Partners		F 403-423
Data Cellular System		F 424-450
Satellite Cellular Systems		F 451-480
Signal Cellular Communications		F 481-499
Crystal Communications Systems		F 500-530
Cellular Pacific		F 531-567
North American Cellular		F 568-599
Bravo Cellular		F 600-633
Alpha Cellular		F 634-700
Conclusions of Law		C 1-C 30

FINDINGS OF FACT
INTRODUCTION

1. On May 29, 1991, the Chief, Common Carrier Bureau designated, *inter alia*,[1] the following fourteen Rural Service Area (RSA) cellular applicants for hearing (6 FCC Rcd 2921): (1) Algreg Cellular Communications; (2) Cranford Cellular Communications (3) New Era Cellular Tele-Communications; (4) Bay Cellular of Florida; (5) Florida Cellular; (6) A-1 Cellular Communications; (7) Bravo Cellular; (8) TNT Communications; (9) Alpha Cellular; (10) Cel-Tel Communications; (11) EJM Cellular Partners; (12) Pinellas Communications; (13) Centaur Partnership; and (14) Signal Cellular Communications.

2. In that same Designation Order, and because there were common issues of law and fact with the fourteen applicants just described, the Chief ordered, *inter alia*,[2] the following eight Rural Service Area (RSA) cellular licensees to show cause why their licenses should not be revoked: (1) Satellite Cellular Systems; (2) JayBar Communications; (3) Data Cellular Systems; (4) Cellular Pacific; (5) North American Cellular; (6) Alpha Cellular;[3] (7) Alee Cellular; and (8) Crystal Communications.

3. In addition to the Chief, Common Carrier Bureau, the following parties participated actively in the trial of this proceeding: (1) Applicants Against Lottery Abuse; (2) The Committee For a Fair Lottery; (3) Thomas Domencich; (4) Miller Communications, Inc; (5) Skywave Partners, Inc.; (6) Buckhead Cellular Communications Partnership; (7) Cellular Applicant's Coalition;[4] (8) Pepper and Corrazini; and (9) ZDT Partnership.

4. The applications of the 14 applicants listed in paragraph 1 *supra.* were designated for hearing on the following issues (6 FCC Rcd 2921 at 2928):

> *A-1:* To determine all the facts and circumstances surrounding the applicant's involvement with the Agreements;[5]

[1] The Chief, Common Carrier Bureau has removed 21st Century Cellular as an RSA applicant in this proceeding. See FCC 92-79 released March 10, 1992 at paras. 12-14 and Footnote 14, and FCC 92M-320, released March 13, 1992 (Confirming Order).

[2] Originally there were nine licensees. But Edison Cellular is no longer a part of this proceeding. See FCC 92M-384 released March 26, 1992.

[3] Alpha Cellular is both a cellular applicant and a cellular licensee. See para. 1(9) and 2(6).

[4] Aka Cole, Raywid, and Braverman. See FCC 91M-2056 released July 5, 1991.

[5] The "Agreements" referred to are the East Coast and West Coast "Mutual Contingent Risk Sharing Agreements" described in para. 1 of the HDO. See 6 FCC Rcd 2921.

A-2: To determine, based on the evidence adduced on Issue A-1 above, which if any of the applicants entered into the Agreements;

A-3: To determine, based on the evidence adduced above, which, if any of the applications should be denied.

5. In designating the above issues, the Chief made it clear (at 2928) that "...the only question to be resolved is whether the individual applicants have, in fact, entered into the Agreements or otherwise taken actions which made them parties to the risk sharing provisions . . . [i]f it is found that they are bound by the Agreements then their applications should be denied."

6. In designating the eight RSA licensees, the Chief set down the following issues (6 FCC Rcd 2928):

L-1: To determine all the facts and circumstances surrounding the permittees involvement in the Agreements;

L-2: To determine, based on the evidence adduced on Issue L-1 above, which if any of the permittees entered into the Agreements.

L-3: To determine whether the permittees who entered into the Agreements falsely certified their applications (Section 22.923) or violated Section 1.65 of the rules with regard to their applications when they were pending;

L-4: To determine whether Alee Cellular lacked candor in failing to reveal to the Commission an alien general partner or that it changed the nature of its partnership;

L-5: To determine whether Alee Cellular complied with the requirements of Section 310(b) of the Communications Act and Section 22.4 of the Rules.

L-6: To determine on the totality of the evidence adduced pursuant to L-1, L-3, L-4, and L-5 above, whether the permits of any of the captioned permittees should be revoked.

7. Both the burden of proceeding and the burden of proof on Issues A-1 through A-3 was placed on the individual applicants. See 6 FCC Rcd 2928 at para. 49. On Issues L-1 through L-6 the burden of proceeding with the introduction of evidence was placed upon the Chief, Common Carrier Bureau while the ultimate burden of proof remained with the individual licensee.

8. At a hearing session held on October 30, 1991, and pursuant to 47 CFR 1.298(b), the Trial Judge orally added an abuse of process issue against four of the licensees represented by David L. Hill, Audrey P. Rasmussen, and Andrew Erlich: (1) Satellite Cellular Systems; (2) Cellular Pacific; (3) North American Cellular; and (4) Crystal Communications Systems. See FCC 91M-3213, released November 5, 1991.[6]

9. That abuse of process issue reads:

L-7: To determine if Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications System have abused the Commission's processes by failing to comply with valid discovery requests, and if not whether they possess the requisite character qualifications to be a Commission licensee.

10. We exchanged our direct case exhibits and witness lists at the August 29, 1991 Prehearing Conference. At the Evidentiary Admission Sessions held on September 6, 9, 12, and 13, 1991, 588 exhibits were formally identified and ruled upon.[7] We started the hearing on September 30, 1991 and completed the Phase I hearings on November 22, 1991. During the Phase I hearings we took the testimony of some 57 witnesses. We held the phase II hearings on March 9 and 10, 1992. The evidentiary record was closed on March 10, 1992 (Tr.13223-13224).

11. The parties filed their Proposed Findings of Fact and Conclusions of Law on February 7, 1992 and their Reply Findings on February 24, 1992.

Background

12. When the Commission tried to administer the Metropolitan Statistical Area (MSA) phase of the cellular allocation program, applicants flooded it with applications. Then after these applications were filed, the applicants entered into partial settlements. This two-step procedure resulted in a host of speculators filing MSA applications; i.e., people who had no real interest in actually constructing and operating a cellular station.

13. Application preparers and promoters encouraged their applicants to form post-filing, pre-lottery partial settlements or "alliances."[8] This ability to sell, trade or transfer minority interests in cellular licenses encouraged speculators and abusers of the cellular process. This, in turn, has impeded and delayed the proper development of the MSA program.

14. The Commission determined that the RSA phase[9] of the cellular allocation program wouldn't suffer from the same infirmities. So they passed a bevy of rules designed to deter speculation, discourage abuse, and ensure a fair shake for each lottery applicant.

15. They passed 47 CFR 22.33(b)(2). That rule prohibits partial settlement agreements among nonwireline RSA applicants. They passed 47 CFR 22.921. That rule prohibits

---

[6] FCC 91M-3213 also served as a Notice of Forfeiture. See paras. 5-7 of that Order. Also see FCC 91M-2954 released September 27, 1991.

[7] All in all over 770 exhibits were formally identified and ruled upon during the course of the proceeding; i.e., both Phase I and Phase II.

[8] The Commission described the situation this way: "By 'partial settlement' we mean any arrangement among fewer than all the applicants in a market that provides any reciprocal interests in the applications of the parties to the arrangement. The term includes the so-called 'alliance agreements' whereby each participant in the alliance agrees that if it wins a particular market it will retain at least 50.1% of the application and that other members of the alliance will each obtain a maximum interest of 0.99% in the winning application."

[9] RSA's consist of those cellular markets not categorized as Metropolitan Statistical Areas (MSAs) or New England County Metropolitan Areas (NECMAs). See *Rural Cellular Service (First Report and Order)*, 60 RR 2d 1029 (1986) Fn.1.

multiple ownership interests in competing nonwireline RSA applicants. They passed 47 CFR 22.922. That rule prohibits the transfer of interests in pending applications. And they passed 47 CFR 22.923(b)(7). That rule requires all applicants to certify that their application is complete, that it complies with the Commission's rules, and that there are no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect ownership interest.

16. The passage of these several rules had a far-reaching impact on the development of the RSA phase of the cellular allocation program. For by eliminating "alliances" and partial settlements the Commission took away one of the vital selling tools of the cellular application preparer and promoter. That fact is important. Because that's what this case is all about.

17. This proceeding is the saga of one such cellular application preparer and promoter, The Cellular Corporation (TCC), and their efforts to circumvent the FCC's rules (See Finding 15 *supra.*) Every one of the fourteen remaining captioned RSA applicants (See Finding 1 *supra.*), and every one of the eight remaining captioned RSA licensees (See Finding 2 *supra.*) are TCC promotions.

18. TCC was founded and formed by Nicholas Wilson[10] in 1984 for the purpose of marketing cellular applications. They marketed their applications predominately through brokers or salespeople on a commission basis. Wilson obtained his sales force by hiring Kent Maerki as TCC's marketing director.[11] Maerki already had a sales force in place at the time Wilson hired him. As founder and Chief Executive Officer of an organization known as Spectra Financial Corporation Maerki had "developed a pretty good network of salespeople." (Tr.4811).[12]

19. Wilson insisted that Maerki's people not hold themselves out as Spectra representatives, but as independent contractors. Spectra was organized with a hierarchy of sales personnel. There were regional managers such as Neil "Doc" Scott under whom were district managers such as Phil Kosh. Consequently, Maerki organized the TCC sales force along the same lines. Under Maerki were Allan Kane, John Dudeck, Dale Aborn, Edward Massey, George Ralston, Robert Baker, Doc Scott, Eric Leong and Phil Kosh. Later Stan Malecki joined as a broker during the RSA phase of the cellular program. In January, 1985, Greg Neely became TCC's Secretary-Treasurer.

20. During the MSA days, Spectra provided sales material to the regional and district managers with the coordination of TCC's offices in Cleveland. In fact, initially the TCC applications were prepared at Spectra's facilities (Tr.4831). Maerki got a 56% commission on sales, 70 percent of which he testified went to his sales force (Tr.4829). The FTC investigation, civil action, asset freeze, consent decree, and fine *infra* ostensibly terminated Mr. Maerki's TCC activities in 1986.

21. During 1985, and while the MSA program was in full swing, the Federal Trade Commission brought an action against TCC, Spectra *et. al.* And on November 13, 1985, the United States District Court for the Northern District of California temporarily restrained TCC from the following activities among others:

> "1. Falsely representing in any manner, directly or indirectly that any applicant in the Federal Communications Commission (FCC) non-wireline telephone license lottery is likely to obtain all or part of a cellular telephone license;
>
> "2. Falsely representing in any manner, directly or indirectly, that past agreements among applicants for a license in the FCC lottery to share in the license (market settlement agreements) suggest that future applicants in the FCC lottery are likely to receive part of a license through similar agreements;
>
> "3. Misrepresenting in any manner, directly or indirectly the value or profit potential of a license awarded through the FCC lottery;
>
> ...
>
> "6. Misrepresenting in any manner, directly or indirectly, the qualifications of, or services provided by application preparers;
>
> ...
>
> "8. Misrepresenting in any manner, directly or indirectly, any other fact material to a customer's decision to purchase application preparation services for the FCC lottery." (Alpha Ex.10, pp.3-4).

22. The District Court also restrained TCC from transferring, disbursing, concealing, dissipating or otherwise disposing of any funds. TCC operated under the Temporary Restraining Order (TRO) until March 4, 1986. At that time

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[10] Wilson had a scrape with securities authorities as early as 1981. On July 20, 1981, the Securities and Exchange Commission issued Release No. 17955 *In the Matter of W.M.C. Roney and Co. and Nicholas R. Wilson,* File 3-6043, SEC Docket, Volume 23, No. 3, dated August 4, 1981. After a public hearing and pursuant to offers of settlement, Wilson was suspended for one year from association in any capacity with any broker-dealer, investment company, investment advisor, or municipal securities dealer.

[11] Maerki has a sordid business background. In 1976 he lost his NASD license because he made false and misleading statements in connection with a margin account. The NASD censured him and barred him for life throughout the United States. Next Maerki and an associate developed a program to market refurbished railroad cars for leaseback. That resulted in his being sued for selling securities based upon material misrepresentations and for omitting to state material facts. Next, in 1983, Maerki helped form a company called Food Source, Inc. That company marketed refrigerated intermodal shipping containers as tax shelters. The SEC sued him, and Maerki signed a consent decree. On September 25, 1984, that consent decree was entered in the United States District Court for the Northern District of California. He was permanently enjoined from offering to sell or buy securities in violation of Section 5 of Securities Act. Next, he began selling unregistered securities in Illinois, and the State of Illinois instituted an action against him. They charged him with violating the registration provisions of the Illinois Securities Act of 1953, and for failing to disclose, *inter alia,* the September 25, 1984 California consent order. There he agreed not to sell securities in Illinois for two years, and to pay a $1500 fine. In Illinois, it was an IRS investigation and a series of newspaper articles that described his product as a scam that "really stopped sales cold." (Tr.4811).

[12] Spectra was formed to make investment products available to financial planners (Tr.4813). These included "antiquities" and "investment grade diamonds." (Tr.3115-3116, 4813). Spectra's main products were tax shelters such as energy devices and record masters (Tr.4816-4817).

the TRO was merged into "Stipulation for Consent Decree and Permanent Injunction." Under the Consent Decree TCC *et. al.* were required to disclose "in all sales brochures, in every oral presentation, and on the front page of all sales or service contracts or agreements with purchasers of their services" the following two items:

> "(1) The purchase of an application from the Cellular Corporation for the Federal Communications Commission's cellular telephone lottery is a high-risk investment. Do not purchase an application unless you can afford and are prepared to lose all the money invested."
>
> "(2) An operating cellular system is unlikely to return any profits to its owners in at least the first three years of operation."

23. Also under the March 4, 1986 Consent Decree, TCC and its co-defendants were required to contribute $400,000 "to be used to complete the application process," and Kent Maerki was personally ordered to pay the FTC the sum of $100,000. Eight days later, on March 12, 1986, Maerki filed a voluntary petition under Chapter 11, of the Federal Bankruptcy Code in the United States Court for the Northern District of Nevada. About a year later, the Court converted Maerki's case to a Chapter 7 liquidation proceeding. At least one witness in this case believes that Maerki filed in bankruptcy to avoid paying the FTC the $100,000 forfeiture ordered in the consent decree (Tr.4337-4340). In fact, the $100,000 fine that the FTC levied against Maerki was discharged in bankruptcy (Tr.4844).

24. Kent Maerki described the impact caused by the TRO, the asset freeze, and the later consent decree. He said, "[t]hat was it. It was over." He described it this way:

> "I mean one day they delivered to my wife, myself information that our checking accounts were closed down, our business was closed down, everything . . . . they did it to Spectra and me. They did it to Cellular Corporation and Nick Wilson . . . [For one hundred days] . . . we were completely shut down . . ."

25. In a companion case, the Internal Revenue Service charged TCC *et. al.* with marketing cellular applications as part of an abusive tax shelter scheme (Tr.2197). That case settled, and TCC paid a $150,000 penalty (Tr.2198).

26. Maerki sent copies of the consent decree to his brokers in 1986. So he says that it would have been impossible for anyone to have had a business relationship with Spectra, Mr. Maerki, Mr. Wilson, or Mr. Neely without knowing about the FTC consent decree (Tr.4883). As George Ralston (Finding 19 *supra.*) put it "we were virtually out of business for 6 or 8 months as I recall." Nevertheless, at the hearing, both Allan Kane and Doc Scott (See Finding 19 *supra.*) feigned ignorance of the FTC decree. It is found that both men were well aware of the FTC proceeding (Tr.4883, 4885, 4886).

27. Following the FTC consent decree Maerki could no longer be involved in TCC sales. But the existing sales force otherwise remained in place for the RSA application sales. They received their commissions (about 30%) directly from TCC rather than through Maerki. At first they dealt with Nick Wilson, later with Greg Neely.

28. TCC hired attorney William Franklin in 1986. Franklin represented clients who had won in MSAs. But he was never told about the FTC proceeding (Tr.2640). It was about this time that the word on the street was that the FCC was going to do away with alliances. When he heard that, Nick Wilson openly asserted that even if the FCC eliminated "alliances," TCC would have "a business plan" that would achieve the same result as "alliances." That was in October, 1986.

29. In November 1986 the FCC started a proceeding to amend the rules for Rural Service Areas (RSAs). See *Rural Service Areas (Notice of Proposed Rulemaking)*, 1 FCC Rcd 499 (1986). This included a proposal to eliminate alliances. Although this proposal, if implemented, would put a serious (if not fatal) crimp in TCC's sales efforts, they did not take the threat seriously (Tr.1523).

30. It was also in November 1986 that TCC began preparing and selling RSA applications. They switched quickly from the MSA program to the RSAs. Otherwise it would have left them with a lot of overhead and little income. Again relying on their brokers, TCC directed their sales efforts at the same people who had participated in the MSAs (Tr.1523, 1805).

31. The brokers told the prospective investors that there was a chance "alliances" would be available (Tr.1531-1532). But they further told those prospective investors that even if the FCC eliminated "alliances" TCC would have "a business plan" that would achieve the same results as alliances (Tr.1536, AALA/CFL Ex. 269, p.3). Stated another way, the brokers took their cue from Wilson (Finding 28 *supra.*), and used "a business plan" concept as part of their selling pitch.

32. TCC continued selling RSA applications in 1987 and early 1988. Greg Neely, Wilson's neighbor (also see Finding 19 *supra.*) became TCC's President in August 1987. Wilson also asked Maerki to get re-involved in marketing TCC's RSA applications. Neely, Wilson, and Maerki conducted seminars for prospective clients that the brokers set up. For example, Maerki conducted a seminar in Oceanside, California on June 7, 1988, that was set up by Doc Scott. Maerki was billed as "one of America's top experts on *Cellular Income for You*" (CCB Ex.181; Tr.4867). Prospective investors at these seminars were told the party-line; i.e., there was a chance that "alliances" would be available, and if not that the "business plan" would be implemented that would give them something close to an alliance (Tr.2385, 4856). TCC's objective was to cultivate in investors a "comfort level" comparable to what they had had from alliances during the MSA days (Tr.4851).

33. TCC was selling RSA applications for individual markets. By February, 1988 they had sold 11,500 RSA applications. People had bought under the assumption that there would be a plan by whatever name (alliances, business plan, linkage, risk-sharing) that would allow them to share revenues with others. People had even been advised that they could get their money back if they didn't like the final rules adopted by the FCC (Tr.1541).

34. Then, on March 29, 1988, TCC's President, Greg Neely, notified the brokers (sales force) that it appeared that the FCC was going to ban alliances after all. He also indicated that scrutiny by competing sales organizations made it prudent not to pursue Wilson's "business plan." Instead Neely suggested "a partnership format;" i.e., he recommended forming partnerships which would file in all 428 RSA markets.

35. The brokers advised Neely that the new approach was unacceptable. As Neely puts it they ". . . got back to me and advised me that was unacceptable, that they had sold applications with the idea that their clients expected a business plan and they wanted a business plan. So we -- that's when I commenced trying to figure out if there was a way to do a business plan" (Tr.1561).

36. The brokers let Neely know that without "a business plan" or "alliances" the clients' money would have to be refunded. This concerned Neely because TCC did not have the funds to give the money back.

37. In early April, 1988, Neely sent a packet of TCC promotional materials to the brokers. Included in that packet was a sample general partnership agreement. It was intended that the partnerships would incorporate later. Neely also included in the packet a letter dated April 4, 1988. That letter explained the partnership program. It also recommended that relatives or husband and wives join different partnerships to increase the odds of winning.[13]

38. Since his own sales force (the brokers) couldn't abide his March 29, 1988 letter (Finding 34 *supra.*), Neely next tried to come up with "a business plan." He came up with the idea of "linked partnerships." Under this concept 10 partnerships would link together thus increasing the probabilities of winning.

39. On April 21, 1988, the FCC issued a News Release. They stated that they (1) had prohibited RSA alliances and partial settlements; (2) had prohibited transfers of interests in pending RSA applications; and (3) had eliminated the rule which allowed applicants to own up to 1% of other applicants (CCB Ex. 307; Tr.1587-1588, 1590, 2379). William Franklin (Finding 28 *supra.*) sent Neely a copy of that release.

40. Six days later (April 27, 1988), TCC held seminars in New Jersey and Florida to announce their new "linked partnership" plan. They indicated that this was the plan that would replace alliances. The plan was to involve both linking and profit sharing. The purpose of linking was to reduce the investor's risk of losing his full investment, and the profit sharing was to be of other people's licenses (Tr.1593, 1594, 1675).

41. The April 27, 1988 New Jersey meeting was held at the Coachman's Inn in Cranford, New Jersey. Greg Neely conducted that seminar. He told the investors that the purpose of the interlocking arrangement was to minimize risk and maximize potential profits, the same goals that the alliance program had. Neely used a slide presentation and relied on Charts captioned "Strength in Numbers" and "There Can Be Problems in Going it Alone." Neely told the investors that an attorney had not yet worked on the linkage idea, but would be developing a contract later on.[14]

42. The April 27, 1988 Florida meeting was held at the Kapok Tree in Madeira Beach, Florida.[15] The meeting was conducted by Kent Maerki and Kathy Dolezal (a TCC employee). The presentation was substantially the same. However, Maerki didn't discuss linkage at the seminar, and he told John Dudeck (see Finding 19 *supra.*) that he wasn't involved in linkage because he believed it had security problems (Tr.4903; also see Finding 21(1) and 21(2) *supra.*).

43. The people at both the Florida and New Jersey meetings were told that there was one chance in a million of losing your investment (Tr.1983). Allan Kane (See Finding 19 *supra.*) who set up and presided over the Cranford meeting described the linkage program as follows:

> "The odds of your *LOSING* your investment with the TCC formula are now so remote that we are pleased to describe to you how 'The Century's Greatest Opportunity' has been converted to 'The Century's Safest Risk'." (AALA/CFL Ex.61).

44. On or around May 5, 1988, in a taped telephone conversation, Neely explained the linked partnership concept to a TCC West Coast broker, Doc Scott. Neely told Scott that a contract would be drawn up (AALA/CFL Ex. 4; Tr.1638-1639, 1643; also see Fn.14 *supra.*). Scott, in turn, informed his West Coast investors about linkage.

45. Neely also wrote a letter to Ed Massey (See Finding 19 *supra.*) in May 1988. There he explained the contemplated link/sharing program, and told "Massey (TCC's broker in Dallas, Texas) that the purpose of "linking" was to "stack the odds" in favor of participants in the linking (or profit sharing) program (CCB Ex. 15; Tr.1645-1646, 1651, 2018).

46. On May 18, 1988 the FCC released the rules that: (1) prohibited RSA alliances and partial settlements; (2) prohibited transfers of interests in pending RSA applications; and (3) eliminated the rule which allowed applicants to own up to 1% of other applicants. (Alpha Ex.4, Tr.1651; Findings 29 and 39 *supra.*) Neely immediately received a copy of those rules.

47. A few days later, Neely received a call from Fred Marsh. Marsh ran a competing application mill. He (Marsh) questioned the legality of the link program's revenue distribution. Neely's version of that conversation is, in part, as follows (Tr.1652):

> "He went on about that this was a tricky way of circumventing the rules and so on and so on . . . He says that we shouldn't be doing this and since we were representing some of his clients in the application preparation phase, he demanded a full refund of his money for those applications . . ."

Neely "immediately" contacted Mr. Franklin by phone on May 23, 1988, right after Mr. Marsh called. They discussed the "basic philosophy" behind TCC's linkage program (Tr.1653). Franklin indicated that"it was not the kind of thing that, on first hearing, I felt that I could understand over the phone." So Neely and Franklin arranged to meet

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[13] This advice was obviously also designed to circumvent the prohibition on having interests in more than one application per market. See e.g. 56 F.R. 28559 *supra.* at para. 24.

[14] The contract Neely was referring to turned out to be the "Mutual Contingent Risk Sharing Agreements" (MCRSAs) that are the subject of this proceeding. See Footnote 5 *supra.*

[15] There were meetings held in Melbourne and Titusville, Florida in the April 27 - May 12, 1988 time frame. Greg Neely conducted those meetings and his remarks were identical to those he made at the Cranford, New Jersey seminar.

in Franklin's office on May 25, 1988. However after their conversation, Franklin did call Tom Gutierrez, Fred Marsh's attorney (Tr.2391, AALA/CFL Ex. 17).

48. They met on that day. Neely brought with him the slide presentation that had been used in the New Jersey and Florida seminars (Findings 40-43 *supra.*). He explained the program to Franklin and told Franklin he (Neely) thought linking didn't violate the FCC rules about ownership and control. Neely further stressed how important the linking/profit sharing plan was, and told Franklin if there was a way to do it, he wanted to do it.

49. Franklin opined that revenue-sharing would be inconsistent with the Commission's rules, but that it might be possible to come up with something similar which would be consistent. But Franklin pointed out ". . . that there would be a level of risk in terms of [FCC] acceptability of any agreement which . . . could not be eliminated and I explored with him and suggested whether he really wanted to go forward with this program at all, and I was told, in very absolute terms, that he wanted me to -- proceed." (Tr.2663).

50. If one is to fully understand the *thrust* of the Neely-Franklin May 25, 1988 meeting, it is also important to know what Neely did not tell Franklin. Neely never told Franklin that as of May 25, 1988, virtually all of TCC's RSA application sales had already been made (Tr.2350, 2385). Nor did Neely tell Franklin that TCC had already been promoting linkage. Rather, Neely presented the plan to Franklin as being merely prospective in nature (Tr.2381, 2390)[16] In any event, Franklin was to research the problem, and if it could be done, draft the agreement (Tr.2664).

51. The next day, May 26, 1988, Fred Marsh wrote Nick Wilson (CC noted to Mr. Neely). There Marsh said:

> "It has recently come to my attention that the Cellular Corporation is publicly and broadly promoting an RSA scheme based upon 'revenue sharing' among TCC-sponsored partnerships . . . on the basis that if one partnership wins and another doesn't the one that wins will 'share revenues' with the one that doesn't . . . [s]hould one of TCC's 'revenue sharing' partnerships actually be selected in one or more RSA lotteries, that win will be challenged early and often." (CCB Ex.11).

52. On June 3, 1988 two events of consequence to this proceeding occurred. First, Franklin completed a draft of the "Mutual Contingent Risk Sharing Agreement" (MCRSA) and sent it to Mr. Neely (AALA/CFL Ex.11). In his transmittal letter, Franklin said: "I believe that we have drafted an agreement which accurately reflects your concept. However, because of the complexity of the concept, you should review it carefully." Franklin also asked Neely to "[p]lease call with your comments so that we can finalize the agreement *for your broker's use*" (AALA/CFL Ex. 11)(underlining added).

53. But on the same day June 3, 1988, Nicholas R. Wilson, TCC's owner and Chairman, and Steven L. Wasserman, TCC's legal counsel and a director, sent a "FOR IMMEDIATE RELEASE" memo to "ALL CELLULAR CORPORATION STAFF, BROKERS AND SALES AGENTS." That memo dealt with the "MARKETING OF RSA APPLICATIONS SUBSEQUENT TO THIRD REPORT AND ORDER OF MAY 18, 1988."

54. That June 3, 1988 memo reads:

> "We have been advised that some of you may be promoting a 'revenue sharing' or other similar business plan in marketing RSA application services. Such representation, if being made, is to cease *immediately*.
>
> You are not authorized to make any statement to prospective applicants concerning 'revenue sharing' or similar alliance agreements, as such plans are clearly violative of recently adopted FCC rules. Do not risk the qualifications of the applicant to win a license.
>
> TCC cannot promote any partnerships for filing RSA applications. *Your clients* are responsible for forming partnerships or business entities for which TCC will engineer, prepare and file RSA applications.
>
> Please advise clients and prospects accordingly.
>
> . . .
>
> cc: William J. Franklin, Esq." (CCB Ex. 17, P.2.[17] [18]

55. A copy of the "Intermediate Release" memo was sent to Allan Kane (TCC's New Jersey regional director and broker), to John Dudeck's Florida office, and to TCC's Sausalito, California office. Greg Neely was upset with the substance of the "Immediate Release." He knew Wilson had collected a lot of money under that promise (Tr.1808).

56. Wilson later explained to Neely why he had prepared and distributed the release (Tr.1664-1665). Wilson thought revenue sharing wasn't legal (Tr.3247). Steve Wasserman, who co-authored the release, wasn't comfortable with the securities aspects of the MCRSA. He was never convinced there wouldn't be a securities problem (Tr.1658-1659, 2034). Nicholas Wilson, TCC's owner, has never retracted the June 3, 1988 release (Tr.2035).

57. On June 7, 1988, Greg Neely, Allan Kane, and Steve Wasserman met with William Franklin in Franklin's office to discuss the matter. During that meeting Franklin told Neely that there was a 98% probability that the FCC would approve the Mutual Contingent Risk Sharing Agreement that he had drafted (See Finding 52 *supra.*); i.e. that it

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[16] Thus Franklin believed his job was to help TCC avoid problems *before* they arose. He didn't realize that his task was to bail TCC out *after* they were in trouble. Not always, but frequently, this can cause the lawyer to adopt different tactics or at least shift the emphasis to meet the problem.

[17] It's clear that as of June 3, 1988, TCC's President Greg Neely, and TCC's Owner and Chairman Nicholas Wilson were traveling on different and inconsistent paths. Wilson apparently was reneging on his promise that even if the FCC eliminated "alliances" TCC would have "a business plan" that would achieve the same results as an "alliance." See Finding 25 *supra*. Wilson was also now distancing TCC from its brokers whom he had always considered independent contractors. See Finding 19 *supra*.

[18] A TCC principal and a witness in this case, Pendleton Waugh testified that during this time frame he (Waugh) and Nicholas Wilson discussed the propriety of the Mutual Contingent Risk Sharing Agreement (MCRSA). See Tr.4141, 4145-4147).

would be passed and accepted by the FCC in the form in which he had prepared it. Neely said that if the probabilities of success and acceptance by the FCC were that high he wanted to go ahead with the linking ". . . because we didn't really want to have to give back all the money [to people who had bought applications] and we would have a problem giving it back." (Tr.1664-1665, 2451). Allan Kane wanted the agreement to be prepared for execution by the partnerships with which he was affiliated (Tr.2708-2709).

58. Meanwhile, on June 7, 1988, out on the West Coast, in Oceanside, California, a seminar was held. Doc Scott set up the seminar; Kent Maerki spoke at the seminar. It was at this seminar that the linkage concept was explained to West Coast investors (Tr.4864; CCB Ex.181). From its very inception Maerki thought that the linkage program had securities problems, and that the risk sharing agreement circumvented the intent of the FCC rules (Tr.4361, 4927).

59. Shortly before August 18, 1988, Neely contacted Franklin. He asked Franklin to update or complete the MCRSA and to present it to TCC customers at seminars. Franklin understood that two groups (in Florida and New Jersey) were going to enter into the same agreement, but separately. So he suggested to Neely that there be a separate execution document. Neely agreed (Tr.2709-2710).[19] Franklin prepared his August 18, 1988 draft on that basis; i.e. he prepared a separate Execution Document for the MCRSA with signature pages.

60. Part of Franklin's updated draft of the MCRSA was an added section. That section was numbered 8.4 and reads in part:

> "8.4 *Regulatory Risks*. Each participant recognizes that the FCC has not approved, ruled on the validity of, or been given the opportunity to approve or rule on the validity of this Agreement. Each Participant accepts the risks that the FCC could disapprove of this Agreement, require a Participant to withdraw from the Agreement, require a Participant to withdraw from the Agreement as a condition to receive an Authorization, dismiss or deny a Participant's FCC Application as a result of its execution of this Agreement or otherwise take action adverse to the interests of one or more Participants . . . each Participant recognizes that these and similar risks are not calculable, and that it has entered into this Agreement after due consideration of the potential benefits and detriments of this Agreement . . ."

61. Franklin included Section 8.4 *exclusively for the benefit of his client, TCC* (Tr.2467). He said that 8.4 was added ". . . to Protect TCC, which was my client at this time, sole client related to this agreement. . . I thought it was the prudent thing to do . . . to protect them against claims, subsequent claims by their customers who would have signed the agreement." (Tr.2467).

62. East Coast seminars were held in Rockledge, Florida on August 23, 1988; in Tampa/St. Petersburg, Florida at Suncoast Communications office (John Dudeck's office) on August 24, 1988; at the Coachman Inn in Cranford, New Jersey on September 8, 1988; and at Stan Malecki's office in Edison, New Jersey on September 9, 1988.

63. William Franklin arrived for the Rockledge meeting with twenty or thirty copies of the August 18, 1988 draft MCRSA to distribute. But Neely told him not to distribute them. (Tr.2479).[20] Neely told Franklin that he was to allow people attending the TCC seminars to review the MCRSA *only* if pressed to do so, and *only* in his (Franklin's) presence, and not to allow anyone to keep a copy (Tr.2509).

64. Franklin then understood that the people who were going to vote on whether to enter the MCRSA would not be permitted to review a copy and make an informed judgment. Rather the procedure was to be for TCC to distribute copies of the MCRSA only to the brokers; the brokers, in turn, would give partnership members or signing partners an opportunity to read the agreement. Franklin never was sure who was qualified to read the agreement. In any event, the partners who attended the seminars were never told who or who couldn't get access to the agreement their partnerships would be entering into.

65. In fact at the Rockledge seminar, John Dolphin (an investor) asked Mr. Franklin to show him the then current draft of the MCRSA. Franklin tried to talk him out of it. Dolphin persisted, so Franklin showed it to him. (Tr.2512-2513). Following his instructions from Neely, Franklin stayed close to Dolphin while Dolphin was reading the MCRSA (Tr.2874).

66. The Rockledge meeting was put together by George Ralson (See Finding 19 *supra.*). The August 24, 1988 Suncoast meeting was put together by John Dudeck. Ralston drove Neely and Franklin from the Rockledge seminar to the Suncoast seminar. At these seminars clients were advised that Franklin had completed the MCRSA and found that it complied with FCC rules. The idea of joining the Florida partnerships with the New Jersey partnerships was introduced at these meetings.

67. At Rockledge, Franklin discussed the fact that the FCC had prohibited alliances. He then told the investors that if the MCRSA was disclosed, petitions to deny would be filed; that if the FCC had been asked to pass upon the validity of the MCRSA in advance, they would have said that you cannot do it; that there was some risk that the FCC would not approve the agreement; but that the agreement didn't need to be disclosed to the FCC.[21] Neely also stated that there was " . . . a chance that the FCC would cause . .. our winning applications to be dismissed because we violated this so-called involvement in other applications." (Tr.1717, 2474, and AALA/CFL Ex. 23).

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[19] Neely says that he didn't want the MCRSA contract to get in the hands of the Fred Marsh's and the Tom Gutierrez' of the world. So he ". . . wanted to keep the numbers of contracts to a minimum and in the hands of the people that were in charge of that area." (Tr.2236).

[20] Franklin's August 18, 1988 transmittal letter to Neely was substantially the same as his June 3, 1988 transmittal (Finding 52 *supra.* with one significant difference. In his June 3rd transmittal, he asked Neely to "[p]lease call with your comments so that we can finalize the agreement for your brokers' use." In his August 18 letter he left off the last four words "for your brokers use." He simply said [p]lease call with your comments so that we can finalize the agreement." Apparently Franklin now saw what Nick Wilson had seen from the very beginning; i.e., treat the brokers as independent contractors and let them take the fall, if somebody had to take one.

[21] Franklin did not view these "investors" at the TCC seminars as his "clients." As far as he was concerned he had no clients other than TCC which was paying his hourly rate (Tr.2981, 2986-2988).

68. At Rockledge partners were given the opportunity to not join the MCRSA (Tr.8734). No one accepted this alternative. George Ralston indicated that the MSRSA agreement was available for anyone who wanted to come to his office (Tr.8752).[22]

69. *After* the Florida seminar (August 23-24, 1992), but *before* the New Jersey seminars (September 8-9, 1992), Franklin further revised the MCRSA. He did so after talking over the situation with Greg Neely, and on August 26, 1988, he forwarded what he believed would be the final version of the MCRSA to Neely.[23] This version not only contained the Section 8.4 business risks paragraph (Finding 60 *supra.*) but two additional sections i.e. 8.5 Business Risks, and 8.6 consultation with the Independent Advisers. The net effect of those two paragraphs was to clear TCC of any business and legal risks by transferring them to the investors. Those sections read in part: (Alpha Ex.1, p.413; Tr.2492):

> "8.5 *Business Risks.* Each participant recognizes that entering into this Agreement could decrease the marketability of its FCC Authorization for an Eligible System; could increase the difficulty of obtaining on the cost of debt financing for an Eligible System; and could decrease the probability of an individual Eligible System . . . Each participant recognizes that these and similar risks are not calculable, and that it has entered into this Agreement after due consideration of the potential benefits and detriments of the Agreement.
>
> "8.6 *Independent Decision.* Each Participant has consulted with its tax, financial, legal, or other advisers as it deems necessary or appropriate prior to deciding whether to enter into this Agreement."

70. Although Franklin added Section 8.5 for TCC's benefit he told Neely that the MCRSA was going to be absolutely unworkable for the business reasons set out in that section. Franklin believed that it was going to be difficult for these partnerships to either obtain financing or sell off their interests. Neely responded, "[d]on't worry about that. Our long term goal is really never to implement this agreement but rather . . . combine them into a single corporation with ownership distributed to the various signatories.[24]

71. The final MCRSA had no fundamental changes from what was described at the Seminars (Tr.2010). The linkage program remained the backbone of the whole RSA program and the investors were told just that at the meetings. However, the cautionary provisions of the MCRSA (Paras. 8.4-8.6) were not discussed or even mentioned. Only the brokers knew about them (Tr.2051, 2141).

72. At the Cranford and Edison, New Jersey Seminars (See Findings 62 and 69 *supra.* the same things were discussed that had been discussed in Florida (Tr.1423, 2498). TCC's brokers used the same format, and Franklin said essentially the same thing. The investors, in attendance, voted at the end of the meeting[25] (Tr.3304). They were also told that there would be a written vote (Tr.2073).

73. At one of the New Jersey meetings, a seminar participant asked for a copy of the MCRSA. Neely did not give him a copy. Instead Neely told the participant to see his broker since it "was inappropriate to have these things floating around at the time."[26]

74. Neely gave copies of the August 26, 1988 MCRSAs to both Allan Kane and Stan Malecki at the September 8-9, 1988 meetings, although Allan Kane claims he didn't get his copy until September 15, 1988 (AALA/CFL Ex.83; Tr. 2068, 2314, 3708). But Neely says all of TCC's regional directors had a copy of the MCRSA: Allan Kane, John Dudeck, and George Ralston on the East Coast; Tye St.James, Doc Scott and Eric Leong on the West Coast.

75. TCC regional manager, Doc Scott carried the laboring oar for explaining the mechanics of the West Coast MCRSA. He did so via memos, seminars, and a telephone conference call.[27] As previously noted (Findings 44 and 58 *supra.*), Kent Maerki spoke at a seminar Scott set up in Oceanside, California on June 7, 1988. The linkage concept was explained at that meeting. In addition Scott arranged for a telephone conference call between William Franklin and the West Coast brokers and partnership signatories (Tr.2223). That conference call took place on September 20, 1988. There Franklin explained the MCRSA and went over the various clauses with the conferees.

76. TCC contemplated distributing copies of MCRSA to the brokers who, in turn, would make it available to the signing partner or members of the partnership (Tr.2479-2480). TCC intended to send the Execution Document for signature to each signing partner, and the Terms and Conditions section to the brokers (Tr.2072).

77. Franklin had recommended that there be some documentation in the approval process. While he didn't prepare ballots he was shown ballots that Allan Kane and George Ralston had prepared (CCB Ex.12, Tr.2481, 2483). Everyone was aware, investors and brokers alike, that in order to have people bound by the deal, the risk sharing agreement had to be signed before the first cellular lottery which was to be held on September 23, 1988.

78. It is against this common background (Findings 1-77 *supra.*) that the fourteen captioned RSA cellular winning applicants (Finding 1 *supra.*), and eight RSA cellular licensees (Finding 2 *supra.*) must be analyzed. When it adopted a *lottery* allocation program, the Commission must

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[22] Later, Stan Malecki (one of the New Jersey brokers working with Allan Kane wanted to obtain a tape of a Franklin Florida Seminar. But Neely refused to make it available saying he (Neely) wanted to "edit it" first (Tr.3971-3974).

[23] On September 20, 1988, Franklin made minor revisions in the East Coast MCRSA (CCB Ex.26, last 3 pages; Tr.1737-38, 2491, 2775).

[24] TCC's *immediate* East Coast plan was to link up some 23 New Jersey and Florida partnerships.

[25] Allan Kane assured his clients that the MCRSA was legal. They depended on his advice, because he was "Mr. Cellular in Cranford." (Tr.3558).

[26] Based on the procedures TCC was taking to maintain confidentiality, William Franklin estimated that there was about only a fifty percent chance the Commission would ever find out about the MCRSA (Tr.2748).

[27] The West Coast investor never lacked for promotional literature. Doc Scott referred to TCC as the "Plus-Quality Company." He boldly announced that "TCC developed the Metropolitan 'alliance' for maximal wins; and now has developed the even finer 'LINKED PARTNERSHIPS' concept for more winners!"

have been aware that it was extending an open invitation to every gambler, speculator, and confidence man within reading distance.[28]

79. Stated another way it's not surprising that the lottery allocation process has been polluted by the Nicholas Wilson's (Finding 18 and Footnote 10 *supra.*), the Kent Maerki's (Findings 18-19 and Footnote 11, *supra.*), the Spectras, and the TCCs (Finding 21-27 *supra.*) But, like it or not, that is who these fourteen RSA Cellular applicants and eight RSA cellular licensees chose to do business with. So the issues set out at Findings 4, 5, 6, 8 and 9 *supra.*, and the potential rules violations described in Finding 15-17 *supra.* must be viewed against that factual background.

A-1 Cellular Communications

80. A-1 Cellular is a new Jersey General Partnership with 16 partners: (1) Mario Alban; (2) Norman Aaron; (3) Frederick Ball; (4) Richard C. Brown; (5) Irwin Burack; (6) Pamela Crane; (7) David Dohanish; (8) Richard Ferri; (9) Allan C. Kane; (10) Leo Kaplowitz; (11) Allan Linderman; (12) Lee Ricki; (13) Albert Stender; (14) Joyce Van Brunt; (15) Richard Wellbrock; and (16) Nina Dawne Williams (CCB Ex. 11).

81. The formulator, administrator, and driving force behind A-1 Cellular is Allan Kane (Finding 80(9) *supra.*). Kane, a financial planner, is a long-time TCC broker. He was commissioned a TCC application salesman in 1984 or 1985, and was one of the brokers in the Kent Maerki network (Finding 18 *supra.*). He sold TCC applications for the MSAs. One of Kane's primary MSA marketing tools was "alliances" (See Findings 12-13 and Footnote 8 *supra.*).

82. Kane held the title of TCC Regional Director. His position allowed him to recruit, train, and market in his area as he chose (Tr.3136). He formed six RSA partnerships including A-1 Cellular. He began selling RSA applications for TCC in 1986. His RSA clients were essentially those to whom he had sold MSA applications.[29] Like all purchase of TCC applications for RSA, the A-1 partners signed a TCC "Application for Services Agreement." In A-1's partnership agreement, Kane was designated as the Partnership's Initial Manager.

83. Kane sold his TCC RSA applications to his clients before it was known that alliances would be prohibited in the RSA lotteries. So (Finding 34 *supra.* when Greg Neely informed his brokers that TCC would be going forward with its RSA "business plan" Kane was among the first to complain (Finding 36 *supra.*). He had no desire to return the money he had already collected from his many investors.

84. When TCC (Neely) developed the linkage concept, A-1 Cellular via Allan Kane not only supported the concept, they spearheaded its implementation. It was Kane, who not only attended, but arranged TCC seminars at the Coachman's Inn in Cranford, New Jersey, on April 27 and September 8, 1988. He sent out invitations to all of his investors (including his A-1 Cellular investors), and also assisted in the presentations of the seminars (Tr.1605-1606, CCB Ex.78).

85. A-1 Cellular partners, other than Kane, attended the April 27, 1988 seminar. For example, A-1 partner, Frederick Ball attended (Tr.5749-5750; 5767-5769). From that meeting Ball understood that after entering the program, if a participating partnership won, some of the proceeds resulting from the win would be shared by others. So, as Ball saw it, there was a great chance to earn a return on one's investment (Tr.5750).[30]

86. Kane sent correspondence to his RSA investors (including his A-1 Cellular clients) announcing the September 8, 1988 Cranford meeting (CCB Ex.87,88). In one of his announcements Kane said, "[t]he profit sharing plan will be described in detail and you will be asked to act upon it with your vote." In another letter he placed the teaser "WYSBIIPS" at the top. Then in a notation at the end of the letter he indicated that the teaser meant "Why you should be interested in profit sharing."[31]

87. At the September 8, 1988 seminar, Franklin gave a presentation on the MCRSA, and Neely spoke about linking the New Jersey and Florida partnerships (CCB Exs. 88-89; Tr. 3299 and 3319). The purpose of the additional linkage was to bring the risk of losing back down to the ratio originally calculated (Tr.3320-3321).

88. On September 12, 1988, Kane mailed ballots to the A-1 Cellular partners requesting them to vote on being included in the profit sharing. He urged them to ". . . increase [their] chances to obtain a greater number of markets." The ballot itself was hardly a model of objectivity. A-1 cellular partners were to either "unreservedly . . . approve the PROFIT SHARING PROGRAM and [to] abide by the conditions of same" or to vote against inclusion in the program and "accept the increased risks and reduced potential profits." (AALA/CFL Ex.76). They were also asked to vote whether to join with twelve Florida partnerships to participate on an equal basis in the profit-sharing program.

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[28] The following brief quotation catches the flavor of the sales pitch of these application preparers and promoters. It's from a May 1988 invitation issued by "Ned Alan Scott [Doc Smith], Ph.D., D.D. - Economist, Theologian, Financial Consultant" (Alpha Ex.1, p. 153): "Many of you *have won* ownership interests in the Federal Communications Commission's coveted CELLULAR LICENSES thankfully. With honest teamwork each of you should become very wealthy and *financially independent* from these in the future. The FCC's announced that those Opportunities will be *gone forever* late this year! Have you ever been sorry for doing something right? Do your other friends, (associates, neighbors, and relatives) know that a one-time $10,000 invested in these now easily has the potential *annual income* return of $50,000 and more *Forever?* . . . "

[29] In fact all of A-1's partners except Kane himself, and Lee Ricki (Finding 80(12) *supra.*) were clients of Kane's. Kane gave Lee Ricki, his secretary, an interest in A-1. The record doesn't reflect whether he paid full value or for that matter anything at all for Ms. Ricki's interest. Allan Kane bought his own and "his family's interests" at a discount. Alan Kane has a 10.15% equity interest in the A-1 Cellular partnership.

[30] Initially the East Coast investors were told that the probabilities of success at the lottery assumed that there would be approximately 300 applications filed in each market. Then, in early August 1988, Allan Kane learned that the number of applications filed per market was on the average over 600. Because of this Kane and Neely planned a strategy to link more partnerships. This included linking Kane's (and Malecki's) New Jersey partnerships with the Florida partnerships.

[31] Note that Kane is talking about "profit sharing" not "risk sharing."

89. A-1 Cellular partners voted unanimously in favor of the profit sharing program and to link with the Florida partnerships. It should be noted that this September 1988 meeting took place long after the U.S. District Court's November 13, 1987 restraining order (Findings 21-24 *supra.*), and long after the FCC had banned RSA alliances and partial settlements etc. (Findings 39 and 46 *supra.*)

90. Upon approval of the A-1 partners Kane signed the execution document binding A-1 to the MCRSA's terms and conditions. He signed the execution document sometime between September 15 and 19, 1988. On September 19, 1988 he mailed the execution signature pages to Franklin (CCB Ex. 25 pg. PC001284; Tr.3393-3394).

91. A-1 applied in all 428 cellular lotteries. They were successful in two of them. They won the lottery for Texas 10 (Navarro) and Missouri 11 (Moniteau). Allan Kane, *inter alia*, signed the applications for both of these markets on September 6, 1988 (See Finding 89 *supra.*). Before he signed these applications Allan Kane read the certification clause on each application (Buckhead Ex. 13, 30; Tr.3851).

92. After the A-1 Cellular applications were filed, Allan Kane kept the A-1 partners informed of any markets that other signatories to the MCRSA had won (Tr.3431-3433; CCB Ex.96). In addition A-1 held partnership meetings at which risk-sharing was discussed. Alan Kane felt that the importance of these discussions was such that outsiders were not permitted to attend the meetings (Tr.3436, CCB Ex.99).

93. A-1 won the Texas 10 RSA lottery on June 14, 1989, and the Missouri 11 RSA lottery on June 28, 1989. However, they never disclosed the existence of the risk-sharing agreement until November 13, 1989. It had been Attorney William Franklin's position from the very beginning that the MCRSA did not need to be disclosed to the Commission. However, another law firm in Washington, D.C., Brown, Finn and Neitert believed that the agreement should be disclosed. (See e.g. Finding 67 *supra.*).

94. In September 1989, Allan Kane attended a meeting at Brown, Finn, and Neitert's law offices where the pros and cons of disclosing the MCRSA to the FCC were discussed. Kane came to believe that his partnerships, including A-1 Cellular should disclose the MCRSA's existence to the FCC ". . . to prevent an S.E.C. violation and severe personal and company penalties." (Tr.3735-3737 and CCB Ex.106, pg. AIC-09-0443).

95. Even after A-1 Cellular had made disclosure to the FCC. Kane still had every intention of proceeding with its terms. However, by the end of December 1989, he was informed that the group of partnerships that had entered into the West Coast version of the MCRSA had voted to rescind the agreement (CCB Ex.38; Tr. 3785-3786).

96. This led Allan Kane to write to the partners in each of the partnerships he was managing. There he told them that they needed to rescind the risk-sharing agreement in order to "assist [their] case at the FCC." (Tr. 3789-3790; CCB Ex.110). Kane enclosed voting forms for partners to sign if they agreed that the MCRSA should be rescinded. 94% of A-1's ownership voted to rescind.

97. *Intermediate Facts.* The foregoing A-1 Cellular facts (Findings 80-96 *supra.*), when combined with the (in-common) background facts (Findings 1-79 *supra.*) lead to certain intermediate findings.

98. A-1 Cellular lacks the qualifications to be a Commission licensee. They have willfully violated 47 CFR 22.33 by entering into partial settlement agreements with other non-wireline RSA applicants.

99. They have willfully violated 47 CFR 22.921 by amassing multiple ownership interests in pending RSA applications. They have violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

100. A-1 Cellular has willfully violated 47 CFR 1.65 by failing to keep their application accurate and complete in all significant respects.

101. Most importantly A-1 Cellular has willfully violated 47 CFR 22.923(b)(7); i.e., when they falsely certified that there were no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect ownership interest.

102. A-1 Cellular entered into the MCRSA. They voted to enter into it; they knew what they were entering into; and Allan Kane bound them when he signed the Execution Document. The fact that they later rescinded it, only fortifies the fact that they knew they had entered into the MCRSA. Moreover, when they finally disclosed the MCRSA's existence to the FCC, they were expressly admitting being a party to that agreement.

103. In his Hearing Designation Order the Chief, Common Carrier Bureau indicated that ". . . evidence of mitigation is not pertinent. "See 6 FCC Rcd 2921 at Footnote 34. But, fearful that indiscriminate enforcement of that admonition would result in less than a full and fair hearing, the Trial Judge ruled early-on that he would receive and consider mitigating evidence. See e.g. FCC 91M-1827 released June 7, 1991, and FCC 91M-2262 released July 24, 1991.[32]

104. With that in mind, A-1 Cellular basically raises two mitigating defenses. First, they say that they (including Alan Kane never had the chance to read the MCRSA, especially Sections 8.4 - Regulatory Risks (Finding 60 *supra.*), 8.5-Business Risks and 8.6 Independent Decision (Finding 69 *supra.*), and that if they had read those sections they never would have entered into the MCRSA.

105. This defense is rejected. When the partners signed the ballots, they knew what they were doing. They were making an informed decision. They had attended seminars where the concept of linked partnership was explained. They had received letters and memos explaining the concept to them, and asking them to sign ballots.

106. Their initial managing partner, Allan Kane, signed the MCRSA.[33] He knew what he was signing. The A-1 partners authorized Kane to sign on the execution page. Kane says he never read Sections 8.4, 8.5 and 8.6 of the risk sharing agreement. That's irrelevant. Moreover, Kane had a copy of the agreement. If he didn't read it before signing the execution page, it's nobody's fault but his own.

107. As a second mitigating defense, A-1 Cellular claims they acted in good faith on advice of counsel. This defense is also rejected. First, it is hornbook law that "advice of

[32] Frankly, enforcement of this admonition would lead to all kinds of evidentiary problems, and result in a reversal, if not from the Commission then from the Court of Appeals.

[33] Allan Kane sold RSA applications, administered them after they were sold, and owned portions of them. He wore three hats.

counsel is not dispositive of a licensee's [or permittee's] responsibilities." See e.g. *Inquiry into WBBM-TV's Broadcast of November 1 and 2, 1967, of a Report on a Marijuana Party*, FCC 69-537 released May 16, 1969 at page 18, Footnote 12. Secondly, a principal (here the A-1 Cellular Partners) is responsible for the acts of his agent (here TCC or TCC's attorney, William Franklin) performed within the scope of his employment.

108. Moreover, the record evidence shows that it wasn't TCC's counsel's advice that did them in. Allan Kane admits that it was he who had the responsibility to disseminate the final version of the agreement to his clients (Tr.3988), not counsel's.

109. The Common Carrier Bureau (at paragraphs 125-126 of their Proposed Findings) asks that adverse demeanor findings be made against Allan Kane. The Bureau points out Allan Kane was not a credible witness, and that his testimony was replete with contradictions. They describe some of his testimony as "incredulous."

110. If the Trial Judge thought demeanor findings were necessary to resolve this phase of the case or were needed to contribute to the conclusions he'd gladly make the findings the Bureau requests. But such demeanor observations are not necessary. Allan Kane came through as a shabby, grasping financial planner who was perfectly willing to use members of his own family for his own potential financial benefit.[34] He is more to be pitied than censured.[35]

111. No, this situation involves sixteen mature adults who must be presumed to understand the consequences of their acts. Each of them decided to take a flier on the RSA lottery; each of them was willing to thumb their noses at the Commission's RSA allocation procedures to better their lottery chances; and each of them was willing to point the guilty finger at someone else when they got caught with their hands in the lottery cookie jar. They opted to do business with the Nicholas Wilsons, the Kent Maerki's, the Allan Kanes, the Spectras, and the TCCs of the world. But now the time has come to pay the bill. Their applications for the Texas 10 and Missouri 11 RSAs will be denied.

Cranford Cellular Communications

112. Cranford Cellular Partnership is a New Jersey General Partnership with 22 partners: (1) Martin Alban; (2) Anthony Capobianco; (3) Faith DeCottiis; (4) Mary Franklin; (5) Leslie Kane; (6) Seth Kaplowitz; (7) Dennis Kirk; (8) Anne Fitzsimmons; (9) William Linderman; (10) John Lyle; (11) Darryl Malcolm; (12) Joann Moshinsky; (13) Frances Newman; (14) Donald Robinson; (15) Thomas Rutmayer; (16) Richard Sperling; (17) Harriette Spero; (18) Frederick Spotts; (19) Paul Todisco; (20) Nina J. Williams; (21) Marie Witman; and (22) Joann Yurick. (CCB Ex.111)

113. Although he is *not* a partner in Cranford Cellular, the formulator, administrator, and driving force behind Cranford Cellular is Allan Kane. Cranford Cellular is one of the six RSA applications he formed. However, one of Cranford Cellular's partners is Leslie Kane, Allan Kane's daughter (Paragraph 112(5) *supra.*). Leslie Kane, the largest equity holder in Cranford Cellular at 10.44%, first learned of the Cellular Corporation (TCC) through her father. In fact, she did not pay TCC for her applications. Her father gave them to her.[36]

114. The facts and circumstances surrounding Cranford Cellular's entry into the risk-sharing agreement are virtually identical to A-1 Cellulars. So the complete background of the seminars attended by Allan Kane's clients and of the promotional literature he sent them, and Allan Kane's role in the formation of those partnerships is set out in Findings 81-96 *supra.*

115. All of Cranford's partners are Allan Kane's clients. Many of them attended his April 27, 1988 seminar where the partnership linkage concept was explained (Finding 84 *supra.*). Kane placed his clients into partnerships "almost instantly" because he was interested in anything that would increase the chances of his participants winning (Tr.3189).

116. Allan Kane formed Cranford in May 1988. In the Cranford partnership agreement, Allan Kane was appointed the partnership's initial manager. Subsequently, he appointed his daughter Leslie Kane to be the signing partner for Cranford (Tr.5604).

117. At Allan Kane's September 8, 1988 seminar (Finding 87 *supra.*), Franklin discussed risk-sharing and Neely discussed linkage with the Florida partnerships. A few days later (as in the case of A-1), the Cranford partners were asked to vote on risk-sharing and the joining with the Florida partnerships (CCB Ex.90; Tr.3326, 3334-3335). They voted unanimously in favor of both proposals (Tr.5477, 5608, and AALA/CFL Ex.78).

118. After the Cranford partnerships had so voted, Allan Kane instructed Leslie Kane to sign the execution page for the MCRSA.[37] Leslie Kane was at their parents house when she signed, She knew that the other Cranford partners had voted in favor of risk-sharing thus authorizing her signature (CCB Ex.2; Tr.5610-5611, 5613, 5615, 5654).

119. Leslie Kane executed the Cranford applications (including the one for the Alabama 5 (Cleburne) RSA on October 16, 1988 (Buckhead Ex.4). She had read the cer-

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[34] For example, Martin Kane (Allan Kane's son and *ostensibly* a 10.47% general partner in Ever-Ready Cellular Communications) testified that his only involvement was to sign the forms his father told him to sign (AALA/CFL Ex.382 and 383).

[35] Notice that the root word is "pity" not "sympathy." Any financial planner that is willing to recommend Kent Maerki's "antiquities" to his clients or to any member of the public (See Footnotes 10-11, Findings 19 and 81 *supra.*) doesn't warrant "sympathy."

[36] Alan Kane was well aware that the Commission's rules prohibit multiple ownership interests in competing nonwireline RSA applications. (See Finding 15 *supra.*). He was also well aware that a simple way to circumvent the rules, but still maximize the mathematical chances of winning was through the use of other family members as owners (See Finding 37 *supra.*, and 56 F.R. 28559 *supra.* at para. 24). So, in five of the six RSA applications that Allan Kane formed, immediate members of the Kane family (Rae, Martin, Daniel, and Leslie, have healthy ownership interests. In the sixth, Alee Cellular Communications, Allan Kane's son-in-law, Robert A. Bernstein, holds a 22% equity interest. In addition, the following Cranford partners also appear to have relatives in other Kane partnerships: Donald Robinson, Martin Alban, Anthony Capobianco, Faith DeCottiis, Seth Kaplowitz, Dennis Kirk, Anne Fitzsimmons, William Linderman, Joann Moshinsky, Frances Newman, Thomas Rutamayer, Richard Sperling, Harriette Spero, Frederick Spotts, Paul Todisco, Nina J. Williams, Marie Witman, and Joann Yurick.

[37] Leslie Kane had discussed revenue sharing with her father on several occasions. He had explained the benefits to her. From the outset she was in favor of risk-sharing because she thought it sounded like a good idea. (Tr.5595-5596, 5606).

tification before she signed it (Tr.5645). On September 23, 1989, Cranford Cellular won a lottery and became a tentative selectee for the Alabama 5 (Cleburne) RSA.

120. The following month, on October 25, 1989, Cranford filed an amendment. There they disclosed that Cranford was a party to a multilateral agreement, the MCRSA[38] (Tr.5620, 5625). After the MCRSA was disclosed to the FCC, Allan Kane informed the Cranford partners they should vote to rescind the agreement to solve any problems on whether it is legal or not (Tr.5508, 5632; also see Finding 96 *supra.*). Cranford partners then signed ballots agreeing to rescind (AALA/CFL Ex.122, pp.19-39; Tr.5551-5552, 5628-5629).

121. It should be noted that Cranford Cellular entered into the MCRSA in September 1988, long after the U.S. District Court's November 13, 1985 Restraining Order and long after the FCC had banned RSA alliances and partial settlements (Finding 89 *supra.*).

122. *Intermediate Facts.* Cranford Cellular lacks the basic qualifications to be a Commission licensee. They have willfully violated 47 CFR 22.33 by entering into partial settlement agreements with other non-wireline RSA applicants.

123. They have also willfully violated 47 CFR 22.921 by amassing multiple ownership interests in pending RSA applications. They have violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

124. Cranford Cellular has also willfully violated 47 CFR 1.65 by failing to keep their application accurate and complete in all significant respects.

125. Most importantly Cranford Cellular has willfully violated 47 CFR 22.923(b)(7). When Leslie Kane certified on October 16, 1988, that there were no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect interest, she was certifying falsely. And she knew that Cranford was a party to the MCRSA. In fact, she signed the Execution Page of the MCRSA on Cranford Cellular's behalf.

126. In brief, Leslie Kane signed the MCRSA. She knew what she was signing. The Cranford Partners authorized Leslie Kane's signature by voting in favor of risk-sharing on written ballots. Cranford Cellular later disclosed to the FCC that they were a party to the Agreement. Then Cranford tried to rescind the MCRSA.

127. There is another independent reason for denying Cranford Cellular's application. They have abdicated their responsibility for the prosecution of their application by turning over that responsibility to a TCC broker, Allan Kane. It was Allan Kane who managed Cranford (Tr.5599). The only reason Leslie Kane can and does claim an interest in Cranford is because Allan Kane gave it to her as a gift. Allan Kane appointed Leslie Kane as signing partner so he could control what she signed. Cranford partner Donald Robinson testified that testified that Allan Kane's control over the partnership was so pervasive that the Cranford partners did whatever Kane told them to do.

128. As previously noted (Finding 103 *supra.*). The Trial Judge has ruled that he will entertain and consider mitigating evidence. With that in mind, Cranford Cellular essentially raises the same two basic mitigating defenses that A-1 Cellular did (Findings 104-108 *supra.*).[39]

129. First, Leslie Kane says she never had access to a copy of the MCRSA, so she never had a chance to read it, especially Sections 8.4 - Regulatory Risks (Finding 69 *supra.*), 8-5 Business Risks, and 8-6 Independent Decision (Finding 69 *supra.*). She suggests that had she read it, that she wouldn't have signed the MCRSA Execution Page.

130. That argument is rejected. It's untruthful. Her father did have the agreement, and there was no reason he could not have provided it to her, if only she had tried (See Finding 127 *supra.*). So she did have access to the MCRSA.

131. Secondly, like A-1 Cellular (Findings 107-108 *supra.*), Cranford Cellular tries to place the blame for their predicament on William Franklin. She says that Sections 8.4 through 8.6 are inconsistent with what Franklin told her partners and is not supported by the facts. It is unreliable hearsay, Leslie Kane never heard Franklin speak. She has, at most, only a nodding acquaintance with some of her 21 partners. She's never talked to them about the problem. She only knows what her father told her.

132. In any event "advice of counsel is not dispositive of a licensee's responsibilities" See Finding 107 *supra.* The record also shows that Franklin was TCC's attorney at the time he wrote Sections 8.4 through 8.6 and owed the Cranford partners no duty whatsoever. His objective in writing those sections was to protect TCC and that's just what he did.

133. Moreover, the record overwhelmingly supports the proposition that it wasn't William Franklin's advice or William Franklin's deeds that did them in. It was Allan Kane that they relied upon from the very beginning and throughout. They entered into the MCRSA on the advice of Allan Kane; they reported the MCRSA's existence to the FCC on the advice of Allan Kane. If they are in a pickle (as it appears they are), Allan Kane is to blame, not William Franklin. Their Alabama 5 (Cleburne) RSA application will be denied.

New Era Cellular Tele-Communications

134. New Era Cellular is another Allan Kane New Jersey partnership with 20 partners: (1) Paul Aaron; (2) William Borski; (3) Richard David Brown; (4) Clinton Crane; (5) Peter Crane; (6) Janet Dohanish; (7) Rosemarie Ferri; (8) Patricia Hernandez; (9) Helen Herres; (10) Margaret Hourigan; (11) Rae Kane; (12) Irene Kaplowitz; (13) Carole Linderman; (14) Charles Mc Devitt; (15) Sue R. Roberts;

[38] While the amendment was purportedly filed pursuant to 47 CFR 1.65, it certainly didn't comply with that section. Under 1.65 the applicant must file the significant change ". . . as promptly as possible and in any event within 30 days . . ." Cranford entered into the MCRSA on or about September 19, 1988 (Finding 90 *supra.*). So over a year had passed before they reported the Agreement's existence to the FCC.

[39] Without in any way criticizing the massive trial undertaking by several of the counsel to this proceeding (in fact, most did yeomanlike work) the record is replete with "cookie-cutter" or "pattern" showings and arguments. The mass production of case exhibits resulted in some cases in identical or almost identical exhibits. The Common Carrier criticizes this commonality and argues that these almost identical exhibits should not be credited. See CCB Proposed Findings at para. 227. That argument is rejected. It's true that the "pattern" showings were frequently not sustainable but it would be improper to reject them simply because they followed a pattern.

(16) Jane Robinson; (17) Gladys Simms; (18) Mark Weinberg;[40] (19) Richard C. Wellbrock; and (20) Gregory Yurick.[41] (CCB Ex.111)

135. Although he is *not* a partner in New Era Cellular, the formulator, administrator, and driving force behind that applicant is TCC broker, Allan Kane. New Era Cellular is one of six applications he formed. However, one of New Era Cellular partners is Rae Kane (para. 134(11) *supra.*), Allan Kane's wife. Rae Kane, the largest equity holder (9.54%) in New Era, was not involved in the MSA lotteries, although her husband had been successful via. alliances (Tr.4026-4027). Allan Kane gave Rae Kane her RSA New Era investment as a gift.[42] The money for her RSA investment came out of Allan Kane's business account, not out of her account or their joint account.

136. The facts and circumstances surrounding New Era Cellular's entry into the risk-sharing agreement are virtually identical to A-1 Cellulars and Cranford Cellulars. Thus the background set out at Findings 81-96 *supra.* and 112-121 *supra.* are relevant background facts.

137. As in the case of A-1 and Cranford, New Era's partners are Allan Kane's clients. Most, if not all of them, attended his April 27, 1988 seminar where the linkage concept was explained. In fact, one of New Era's partners, Mark Weinberg, made a presentation at the April 27 seminar (Footnote 40 *supra.*).

138. Allan Kane formed New Era in June 1988 as a general partnership for the purpose of applying in RSA cellular lotteries (New Era Ex.6A; Tr.3200). In the New Era partnership agreement Allan Kane was appointed the partnership's initial manager. Subsequently, he appointed his wife, Rae Kane, to be New Era's signing partner.

139. On September 8, 1988, Allan Kane sponsored another seminar to brief his clients on risk-sharing. William Franklin discussed risk-sharing and Greg Neely discussed linking with the Florida partnerships. A few days later (as in the case of A-1 and Cranford Cellular), the New Era partners were asked to vote on risk-sharing and joining with the Florida partnerships. (CCB Ex.90; Tr.5686). The New Era partners voted unanimously in favor of both proposals (AALA/CFL Ex.79; Tr.4062).

140. After the New Era partners had so voted, Rae Kane signed the Execution Page for the MCRSA (Tr.4062; CCB EX.25). When she signed she fully intended for New Era to enter into the risk-sharing agreement because her partners were in favor of risk-sharing, and had authorized her signature (Tr.4062-4063). Allan Kane witnessed Rae Kane's signature (Tr.4064). Allan Kane then signed the Execution Page for A-1 Cellular (Finding 90 *supra.*); and Rae Kane witnessed his signature (Tr.4066).

141. On September 6, 1988, Rae Kane signed all the New Era applications submitted to the FCC for the RSA lotteries (Buckhead Ex.6; Tr.4101-4103), including the application for the Arkansas 9 (Polk) RSA. She had read the certification before she signed it. On August 9, 1989, New Era won a lottery and became a tentative selectee for the Arkansas 9 (Polk) RSA.

142. On November 13, 1989, New Era filed an amendment to their application. Rae Kane signed that amendment. There New Era disclosed to the FCC that they were a party to the multilateral MCRSA (AALA/CFL, Tr.4073-4075). After they had disclosed the MCRSA to the FCC, Allan Kane told the new Era partners that the agreement may be illegal (Tr.4083), and that they should vote to rescind or they could lose the market they had won (Tr.5711). The New Era partners then voted to rescind (AALA/CFL Ex.122 pp.1-18, Tr.5709-5710).

143. It should be noted that New Era entered into the MCRSA in September 1988, long after the U.S. District Court's November 13, 1985 Restraining Order, and long after the FCC had banned RSA alliances and partial settlements (Finding 89 *supra.*).

144. *Intermediate Facts.* New Era Cellular Telecommunication lacks the qualifications to be a Commission licensee. They have willfully violated 47 CFR 22.33 by entering into partial settlement agreements with other non-wireline RSA applicants.

145. New Era has willfully violated 47 CFR 22.921 by amassing multiple ownership interests in pending RSA applications. They have violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

146. Most importantly, New Era has willfully violated 47 CFR 1.65 by failing to keep their application accurate and complete in all significant respects. On September 6, 1988, Rae Kane certified that there was no misunderstanding or agreements not disclosed in the application which grants anyone else a direct or indirect interest. Technically that was true on September 6, 1988. But within two weeks, she signed the MCRSA. She knew what she was signing. She knew that the New Era partners had authorized her signature by voting in favor of risk-sharing on ballots. So she knew that her September 6, 1988 certification was no longer accurate. Yet New Era made no move to report the report the MCRSA until November 13, 1989, over a year later, about three months *after* New Era had won the Arkansas 9 (Polk) RSA.

147. There is another independent reason for denying New Era's application. They have abdicated their responsibility for the prosecution of their application to a TCC broker, Allan Kane. It was Allan Kane who managed New Era. The only reason Rae Kane can claim an interest in New Era because Allan Kane gave it to her as a gift. Allan Kane appointed Rae Kane as signing partner so he could control what she signed. The testimony of New Era partners, Patricia Hernandez, Gladys Simms, Clinton Crane, and Mark Weinberg substantiate Allan Kane's control (New Era Exs. 3 at 1, Ex. 6 at 1, Ex. 7 at 1; Tr.5675; 5677; 5685; 11580-11582; 11,738-11739; 11,765; 12,350; 12,361-12,364; and 12,384). It was Allan Kane who suggested that New Era disclose the existence of the MCRSA to the FCC. And it was Allan Kane who later told the New Era partners to rescind the MCRSA.

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[40] At the Cranford April 27, 1988 seminar, Mark Weinberg gave a presentation on the probabilities of winning lotteries after linking with other partnerships (New Era. Ex.3, Tr.5680)

[41] By comparing the partners listed in Finding 134 *supra.* with those in Findings 80 and 112 *supra.*, Allan Kane's use of other family members as partnership owners becomes self-evident. See Footnote 36 *supra.* and Finding 37 *supra.*

[42] Allan Kane claims that he gave his entire *family* gifts of an RSA investment (Tr.3201-3204).

148. As previously noted (Findings 103, 128 *supra.*), New Era was permitted to proffer mitigating evidence. They essentially offer the same two mitigation defenses that A-1, and Cranford raised (See Findings 103-108 and 128-130 *supra.*).

149. First Rae Kane says she never had a chance to read the terms of the risk-sharing agreement before signing the Execution Page. That argument is rejected as inaccurate. Her husband Allan Kane had a copy of the MCRSA. So she did have access to the agreement. She just never asked to see it. So it's her own fault that she never read the MCRSA.

150. Secondly, New Era tries to place the blame for their predicament on William Franklin, the author of the MCRSA. That defense is also rejected. Advice of counsel doesn't dispose of a permittee's responsibilities. In any event Franklin wasn't New Era's counsel at the time they entered into the MCRSA in September 1988. The record demonstrates that New Era continuously and ultimately relied on Allan Kane, not William Franklin. New Era's application for the Arkansas 9 (Polk) RSA will be denied.

Alee Cellular Communications

151. Alee Cellular Communications, is another Allan Kane New Jersey partnership with 14 partners: (1) Robert A. Bernstein; (2) Joel Bunis; (3) Becky Jo Clark; (4) Vincent DiCostanzo; (5) Kandice Dolphin;[43] (6) Eugene Grumer; (7) Nancy Kielner; (8) Jay B. McInerney; (9) George Malanga; (10) Nadine Marie-Mulvaney; (11) Northeast Cellular Communications; (12) Edward Rogers; (13) Shafi Sharifan; and (14) Dennis Spence.

152. Although he is not a partner in Alee, the formulator, administrator, and driving force behind the Alee partnership is TCC broker, Allan Kane.[44] However, unlike the other five, Alee was not entirely composed of Allan Kane's clients (Tr.3159, 3419-3421). Kane describes Alee as "a pickup team" comprised of investors purchasing applications through other brokers, through TCC directly, or on a walk-on basis. (Tr.3419-3421). The name "Alee" is a combination of the first names of Allan Kane and Lee Ricki, his secretary (Tr.3679). Kane put the partnership together on or about June 1988 (Alee Ex.1A).

153. Allan Kane was Alee's manager at its inception. He chose Robert Bernstein to be the signing partner. Bernstein is Kane's son-in-law. He is a general partner and the largest equity holder in Alee at 22%. Bernstein, an attorney, received his interest in Alee at a discount for miscellaneous legal advice he provided to TCC (Tr.3201-3202, 5872).

154. Bernstein signed the Alee RSA applications to be filed with the FCC on July 28, 1988. This included the application for the New Mexico 3 (Catron) RSA. The applications were filed on August 12, 1988. He read the transmittal sheet certification and the application certification before signing them.

155. Some but not all of Alee's partners attended Allan Kane's September 8, 1988 Coachman's Inn Seminar in Cranford, New Jersey. For example, Terry Jones attended. He heard William Franklin explain risk-sharing and Greg Neely discuss linking with the Florida partnerships. However, even those Alee partners who did not attend the Cranford Seminar had the linkage (risk-sharing) concept fully explained to them. For example, Becky Jo Clark (See Finding 151(3) *supra.*) had the concept fully-explained to her over the telephone by Greg Neely (Alee Ex.1, p.2; Alee Ex.5, p.1; Tr.6328, 11,642).

156. Robert Bernstein and Allan Kane had discussed the risk-sharing concept. Kane explained to Bernstein that under the program, profits would be shared even if a signatory to the agreement never won a market. This all occurred before Bernstein received his ballot for the MSRA. Bernstein relied on Kane's explanation. Allan Kane also told Bernstein that the agreement had to be kept confidential so that no one could copy it (Alee Ex.1 at 1, Tr.5871, 5875-5876, 5881-5882, and 6006).

157. On September 12, 1988, Allan Kane sent out two letters to the Alee partners. One letter contained a ballot for the MCRSA. But the other letter was a form that included a question about citizenship. This latter letter will be covered *infra.* The ballot was identical to the one used for A-1 Cellular (Finding 88 *supra.*), Cranford Cellular (Finding 117 *supra.*) and New Era Cellular (Finding 139 *supra.*)

158. Alee partners were to either "unreservedly . . . approve the PROFIT SHARING PROGRAM and [to] abide by the conditions of same" or to vote against inclusion in the program and "accept the increased risks and reduced potential profits." (AALA/CFL 76). They were also asked to vote whether to join with the twelve Florida partnerships on an equal basis in the profit sharing program.

159. The Alee partners voted in favor of the profit sharing program and to "abide by the conditions of same." They also voted to include the Florida partnerships in the risk-sharing program. (CCB Ex.125; Tr. 5880, 6344-6346, and 11,649-11,653). Alee was well aware of what they were voting for. Terry Jones[45] concluded that revenue-sharing made sense (Tr.11658). When she voted in favor of risk-sharing, Becky Jo Clark (Finding 151(3) and 155 *supra.*) intended to share profits. (Tr.6467).

160. Allan Kane told Robert Bernstein that all the Alee partners had voted in favor of risk-sharing. So Bernstein, as Alee's signing partner, signed the Execution Page of the MCRSA. He signed sometime before September 20, 1988, on an evening when Allan Kane was having his family over for dinner. When Bernstein signed it he knew it was for the profit-sharing program and that he was signing it for Alee. Allan Kane witnessed Bernstein's signature (Tr.5884).

161. After Alee entered into the MCRSA, Allan Kane sent information letters to his partnerships, including Alee. There he referred to their "ancillary" interests in other applications, ownership interests of family members, and the potentials of profit-sharing. See e.g. CCB Ex.116; Tr.6445. On November 6, 1989 in a letter to the Alee partners he said, "it should be kept in mind that it was because of this [risk-sharing] concept that most everyone

[43] The partner is not really Kandice Dolphin but a partnership called Cellular Dream Partnership.

[44] On January 14, 1990, the partnership ostensibly voted to terminate Allan Kane's services as manager.

[45] Actually Terry Jones is Northeast Cellular Communications. See Finding 151(11).

invested in the program, since it was recognized as having substantially reduced the lottery risks" (AALA/CFL Ex.118 at 2).

162. Earlier, on November 14, 1988 Kane wrote a letter to "Cellular Investors." There he proclaimed that the "multiple minority" winners would "experience revenues that were not even projected when they originally invested."

163. In December 1988, Alee won the lottery for the New Mexico 3 (Catron) RSA. Kane "notified the world" by "communicating a letter, sending a letter to everybody, congratulating Alee" (Tr.3424). On August 4, 1989, Alee was granted a construction permit for that market.

164. In 1989 Kane continued to keep his partnerships abreast of cellular lottery developments; i.e. he continued notifying them when their "linked" partners won lotteries (Tr.3431-3433). For example, on April 19, 1989, Kane sent a "General MSA/RSA Status Report" to "Cellular Investors" announcing lottery wins by TNT, JayBar and Alee (CCB Ex.96 at 8, 13). There is no evidence that any of Alee's partners, upon receiving these reports and correspondence, did not consider Alee to be a party to the MCRSA.

165. After discussing the matter with Allan Kane, on November 7, 1989, Robert Bernstein disclosed to the Commission that Alee Cellular was a party to the MCRSA (AALA/CFL Exs.159, 160; Tr.5917). The Alee executive committee had authorized Bernstein to disclose (Tr.6453).

166. Meanwhile Richard Brown of Brown, Finn, and Neitert advised Allan Kane that the termination of the East Coast Agreement "may help our case at the FCC." (CCB Ex.110; Tr.3789). So Kane sent out rescission ballots to the Alee partners as well as to his other partnerships. In January 1990, two-thirds of Alee partners (including Bernstein) voted in favor of rescission (AALA/CFL Ex. #122), Tr.6016-6017). While these East Coast partnerships have tried to rescind the MCRSA, they have apparently been blocked by some losing Florida partnerships refusal to consent to rescission (Tr.8785-8788).[46]

167. It should be noted that Alee entered into the MCRSA in September 1988, long after the U.S. District Court's November 13, 1985 restraining order and long after the FCC had banned alliances and partial settlements.

168. *Issues L-4 and L-5.* Unlike the other Allan Kane generated applications *supra.*, Alee Cellular faces an alien and an alien misrepresentation issue. See Finding 6, Issues L-4 and L-5 *supra.*

169. As previously noted (Finding 151(13)), Shafi Sharifan was, and still must be considered an Alee general partner (4%)(CCB Ex.113; Tr.6715). Sharifan is a citizen of Iran; he has never been a United States citizen (Tr.6698-6699, 6702).

170. Sharifan purchased his 4% partnership interest from a Mr. Joseph Lanza, a salesperson for TCC subbroker Stanley Malecki (Finding 19 *supra.*; and Tr.6707). At the time of purchase Lanza filled out Sharifan's TCC Cellular Applicant Questionnaire (CCB Ex.3), without asking Sharifan the questions (Tr.6710). Thus Sharifan was never asked any questions about his citizenship. He merely signed the completed form.

171. Sharifan thought that Lanza knew he (Sharifan) was not a citizen. On June 27, 1988, Sharifan signed an execution document for the partnership agreement and became an Alee partner (CCB Ex.113; Tr.3460, 6712, 6715). On August 12, 1988 (Finding 154 *supra.*), Alee filed the applications (including the subject application) listing Sharifan as an Alee partner (Buckhead Ex.42).

172. Sharifan attended Allan Kane's September 8, 1988 Coachman's Inn seminar in Cranford, New Jersey (Finding 155 *supra.*). There he talked with Allan Kane. Kane, who had never met Sharifan, was immediately struck by Sharifan's physical appearance and accent, and became concerned that one of the partnerships might have alien ownership (Tr.3328-3330). However, and inexplicably, Kane did not simply ask Sharifan about his citizenship (Tr.6718).[47]

173. Kane then talked to Stan Malecki; he told Malecki they should check into the citizenship of the partners, because a gentlemen spoke with an accent (Tr.4558). Malecki checked with Lanza, and Lanza found out that Sharifan was not a citizen. A day or so later Malecki and Lanza met with Sharifan. Sharifan again confirmed to them he wasn't a citizen (Tr.4556, 6720).

174. As a result of his encounter with Sharifan, Kane sent a written inquiry about citizenship status to each partner in the partnerships he managed (See Finding 157 *supra.*; CCB EX.90; Tr.3330, 3334). Sharifan never responded. So Kane contacted Neely about the problem. Neely said he'd take care of it (Tr.3443).

175. Meanwhile Lanza and Malecki told Sharifan that he'd have to sell his interest. Sharifan decided to transfer his cellular interests to his brother-in-law, Amir Riahi-Shiraz, a United States citizen (Tr.6720-6723; CCB Ex.4). This meeting took place before September 20, 1988 (Tr.4564). On September 15, 1988, Sharifan voted in favor of the MCRSA (CCB Ex.125; Tr.6733-6734).

176. Malecki contacted TCC who sent the necessary transfer papers. On September 23, 1988, Sharifan executed an assignment agreement to transfer his cellular interests to Riahi for $10,000 (Alee Ex.2, At.2), although at the time of hearing, he had not been paid (Tr.6725-6726). None of TCC's representatives (Neely, Allan Kane, Malecki, or Lanza) have ever offered Sharifan a refund of the money he has invested. (Tr.6721).

177. Allan Kane had requested documentation about this from Malecki (CCB Ex.12; Tr.3483). And on October 12, 1988, Malecki's office sent Kane the Riahi transfer paperwork to Kane. Sharifan discussed his alien status with Kane (Tr.6752). Malecki was now under the impression that Riahi was a partner, and Sharifan was not, since he was not aware that 47 CFR 22.922 prohibited a transfer of interests in pending applications. (Tr. 4566).

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[46] All the East Coast winners in this proceeding (excluding the non-partnership Algreg) have notified the Commission through declarations that their partners have voted to rescind the MCRSA. See Pinellas Ex.4; JayBar Ex.1; Florida Cellular Ex.1; EJM Ex.2; Centaur Ex.4; A-1 Ex.3; New Era Ex.6; Cranford Ex.3; Alee Ex.1; Edison Ex.1; TNT Ex.2; Cel-Tel Ex.2; and Bay Cellular Ex.2. Thus we have one more almost universal indication that all the East Coast Partnerships believed themselves to be parties to the MCRSA.

[47] Allan Kane claims that during the seminar he announced that non-citizens couldn't be Commission licensees (Tr.3330).

178. Although Allan Kane had requested and received the Sharifan-Riahi transfer papers (Finding 177 *supra.*), although his September 8th encounter with Sharifan so struck Kane that he initiated an alien ownership inquiry in his partnerships (Finding 172 *supra.*), and although he had discussed Sharifan's alien status with Sharifan himself (Finding 177 *supra.*), at the hearing Kane claimed that he had only paid "scant attention" to the transfer documents and that he had never reached a conclusion in his own mind whether Sharifan was an alien (Tr.3577).[48]

179. On November 20, 1988, Allan Kane and Stan Malecki conversed on the telephone. Kane referred to the alien problem among other things (Tr.3462-3463; CCB Ex.5). Kane further indicated that the possibility that the Commission would even find out about the alien was remote (Tr.3464).[49]

180. In early December 1988, Alee won the lottery for the New Mexico 3 (Catron) RSA. (See Finding 163 *supra.*). A day or two later they retained William Franklin as their communications counsel. Kane sent Franklin a list of Alee's partners and their occupation. Sharifan was included on the list, but had no occupation listed. At that time Franklin was unaware of the citizenship problem.

181. On December 14, 1988, Kane wrote Franklin. There he discussed the alien ownership problem and recommended that it be fully disclosed to the Alee partners so that they (the partners) would be aware of the risks (Tr.3466-3467). Two days later they talked over the telephone. Among other things they discussed: (1) the possibility of forming Alee II, a partnership without Sharifan; (2) whether or not to disclose the existence of an alien to the FCC; and (3) Section 22.922's prohibition on alienation of interests in pending applications.

182. Allan Kane felt that Sharifan should be instructed not to respond to any mailings or communications except from Kane as partnership manager. Kane believed that "if we tell the partnership now about the problem, someone will talk about it and [it] could only make it worse [since] this is definitely a violation." (*Cf.* Finding 178 and Fn.48 *supra.*).

183. After Alee won the lottery, a partnership meeting was scheduled for December 19, 1988. Before the meeting, Allan Kane called William Franklin, asked him a number of questions and arranged for Franklin to attend the meeting by speakerphone. At the December 19th meeting Sharifan's citizenship problem was discussed. However, the minutes of that meeting only reflect that "confidential matters" and "certain circumstances prevailing in the partnership" were discussed. Allan Kane admits that he was talking in codes, and that this referred to the alien issue (Tr.5908).

184. Before the December 19 meeting, Kane faxed an agenda to Franklin, and he expressed his concern about how to tell the partners about the alien in Alee. Kane says Franklin advised him "to let sleeping dogs lie;" i.e., not to substitute Sharifan with another partner as this would only raise suspicions, and there was no real alternative option to recommend (Tr.3457). This resulted in Kane writing the memo "Loose Lips Sink Ships" (Tr.2563-2564, 6008).

185. At about 9:00 p.m. on December 19, Franklin spoke to the members. He says he offered alternative courses of action, including the alternative that the partnership continue to rely on Sharifan's original questionaire which represents that he is a U.S. citizen (But see Findings 170-171 *supra.*).

186. Allan Kane says that he isn't sure he told the Alee partners that there really was an alien general partner, but only referred to it as a "possible" problem (Tr.3469). Nobody agrees with that testimony. John Dolphin attended the December 19, 1988 meeting. He says that the alien's existence was "mentioned as a statement of fact." (Tr.5409-5410). Becky Jo Clark testified that Kane told the partnership that there had been an alien in Alee but that he had been removed. (Tr.6357). Robert Bernstein was well aware of the gravity of the situation the minute Allan Kane revealed the alien's participation. (Tr.5903) Bernstein says the partnership was told that the alien had been substituted with a U.S. citizen (Tr.5905). Alee's partners never discussed the possibility of simply calling Sharifan to ask if he was an alien (Tr.2635).

187. Stan Malecki attended the December 19, 1988 Alee meeting. At one point he testified that not only was the alien issue raised at the meeting, but Kane *named* the alien, and even represented that Sharifan was indeed not a U.S. citizen (Tr.4573-4575). However, after a recess in the hearing, Malecki testified that he could not state for certain whether Sharifan had been mentioned by name, but Kane did say there was an alien (Tr.4762). Malecki says that there was no doubt in anyone's mind that Sharifan was an alien (Tr.4575).[50]

188. In any event, at the December 19th meeting Alee's partners decided to consider Sharifan as a partner with respect to the New Mexico 3 application. So, despite having information to the contrary, Alee consciously decided to rely on Sharifan's original TCC questionnaire (which he himself did not complete), and to either maintain that he was a U.S. citizen, or if not, that the partnership was unaware of the fact (Tr.2544-2545; CCB Exs.10 and 62 at 1; Tr.6710).

189. The following day (December 20, 1988), Kane's office billed Sharifan $200 for his portion of a capital call (Tr.3445; CCB Exs. 114, 115). After receiving the invoice Sharifan called Kane. He reminded Kane that he was the alien and that he had transferred his interest to Riahi (Tr.6731-6732). Kane told him to pay the $200, and to attend future partnership meetings. (Tr.6735, 6751). Sharifan paid the $200 capital call. It's never been returned to him (Tr.6735, 6751).[51]

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[48] This testimony borders on the incredible, especially in view of the events that follow *infra.* It's not necessary to make adverse demeanor findings against Allan Kane to rule on these Kane-managed applicants (Findings 109-110 *supra.*). But some of these incidents must be called to the appellate body's attention.

[49] This insolent attitude toward the FCC, its policies and its rules permeated this proceeding. The lack of respect for the Commission and its staff was evident in both the attornies and the witnesses. It was disheartening to a government career man of 42 years, the last 35 of which have been with the FCC.

[50] There is a basic problem with relying on any of Stan Malecki's testimony. While he appeared to be a lot more reliable than Allan Kane, serious questions have also been raised about Malecki's capacity for truth and veracity. See FCC 91M-3386 released December 4, 1991.

[51] On December 22, 1991, Allan Kane sent a letter to Malecki

190. Later, in February 1990, Sharifan paid another capital call of $1,000. Riahi also paid a $1,000 capital call. In this case Sharifan got his money back. On March 19, 1990, Alee's Terry Jones made out a check to Sharifan for $1,000. However, the check was not sent out until July 2, 1990 (Tr.652; 11667-11669; CCB Ex.119).

191. On December 28, 1988, Franklin wrote Bernstein. He said (CCB Ex.62; Tr.3480-3481);

> "Per the partnership's decision at its December 19, meeting, we have retained Mr. Sharifan's identification as an Alee partner. In so doing we are relying on the information he initially provided to Alee as to citizenship. As the partnership discussed, this approach creates the risk of dismissal for subsequent applications if this application and its amendment were compared to subsequent applications. However, as the partnership discussed on balance this alternative minimizes risk to Alee."[52]

However, Franklin sent this letter to Allan Kane's address. Then Kane gave it to Bernstein (Tr.3481, 5914). Franklin testified that Alee consciously tried to establish a paper trail from Franklin to Bernstein so that it would not appear that Alee had ceded control to Kane "in the FCC sense." (Tr.2567). Kane had asked Franklin to send all Alee correspondence directly to him (CCB Ex.14). Although mail was sent specifically to Bernstein, it was sent "in care of" The Cellular Partnership Management Company operated by Kane (CCB Ex.10).

192. On January 9, 1989, Franklin filed a 47 CFR 1.65 amendment (signed by Bernstein) which listed Shafi Sharifan as an Alee partner (AALA/CFL Ex.158; Tr.5914, 5972). Alee filed other applications with the Commission which list Riahi as an Alee partner and not Sharifan. In Tiers 1 and 2 Sharifan was listed as an Alee partner; in Tier 3 he was not. Bernstein signed these applications and certified that they were accurate (Tr.5973, 5990).

193. On December 16, 1989, Sharifan attended an Alee partnership meeting (CCB Ex.117; Tr.3447, 3572). On January 3, 1990, Sharifan signed a document to rescind the MCRSA (CCB EX.127; Tr.3458, 6746-6747; Finding 166 *supra.*). In January 1990, Sharifan also signed a document for a change of FCC counsel (CCB Ex. 126; Tr.3488). He got these documents from Allan Kane (Tr.6744). Sharifan attended[53] another Alee partnership meeting (CCB Ex.118; Tr.3447-3448). He also remembers giving a proxy to Allan Kane on one occasion (Tr.6739-6740).

194. *Intermediate Facts.* Alee's license for the new Mexico 3 RSA will be revoked. They are not of fit character to remain a Commission licensee. They have willfully violated 47 CFR 22.33(b)(2) of the Commission rules by entering into partial settlement agreements with other non-wireline RSA applicants and licensees.

195. Alee has wilfully violated 47 CFR 22.921 and 22.922, by indirectly amassing and indirectly transferring interests in pending RSA applications. And they have wilfully violated 47 CFR 1.65 by failing to keep their New Mexico 3 (Catron) RSA application accurate and complete in all significant respects. Robert Bernstein certified all of the Alee applications on July 28, 1988. There he certified that there were no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect ownership interest. But at the time he signed he was aware that TCC (his application packager) was planning a "business plan" or "linkage program." Moreover, less than two months later, Bernstein signed the MCRSA on Alee's behalf.

196. Alee entered into the MCRSA. Robert Bernstein, Alee's signing partner partner, signed the MCRSA's Execution Page knowing that he was signing the MCRSA; Allan Kane had told him that his fellow partners had voted in favor of the MCRSA. The other partners had in fact voted in favor of Alee's participation in the MCRSA. Alee's members had had the profit sharing concept fully explained to them. They had attended at least two seminars on the subject. They wanted to better their chances of winning in a lottery and guarantee their investments.

197. Alee filed their RSA applications (including New Mexico 3) on August 12, 1988, and entered the MCRSA the following month. Under 47 CFR 1.65 they should have disclosed the MCRSA to the FCC. They not only intentionally failed to disclose the existence of the agreement, they participated in a cover-up not to disclose the agreement to the Commission. This isn't the kind of applicant the Commission and the public have a right to expect.

198. Moreover, there is another independent reason for revoking Alee's application. Alee's partners abdicated the responsibility to a TCC broker, Allan Kane. It was Allan Kane who formed Alee, who was its initial managing partner, who appointed his son-in-law Robert Bernstein to be the signing partner, who promoted the MCRSA, who drew up the ballot for the MCRSA vote, who fostered the concept of Alee finally disclosing the MCRSA's existence to the FCC, and who spearheaded Alee's recission of the MCRSA.

199. Finally, Alee was in violation of 47 USC 310(b) at the time they filed their application. One of their partners was an alien, Shafi Sharifan. The participation of an alien general partner is a major defect that cannot be cured by amendment. *See Continental Cellular* 6 FCC Rcd 6834 (1991). Alee (actually Kane, Malecki and company) recognized their predicament. So they fomented a cover-up. They knew Sharifan was an alien, but they filed a 47 CFR 1.65 amendment that represented to the Commission he was a U.S. citizen. A deceit, pure and simple.[54] Alee lacks character.

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asking him to get Sharifan to send his $200 (CCB Ex.115; Tr.3446, 4566). On December 27, 1988, Malecki wrote Greg Neely asking him for a status report on the Riahi assignment and asking which one (Sharifan or Riahi) should remit the money for the capital call (CCB Ex.56).

[52] Alee never reported the September 23, 1988 ownership transfer from Sharifan to Riahi until April 30, 1990 when Hopkins and Sutter advised the Commission of the change (Alee Ex.2, At ¶ 4 at 4).

[53] It's passing strange: although Alee has only 14 general partners, none of them seem to know or even are able to identify Shafi Sharafan. Talk about the plague. However, Robert Bernstein remembers meeting Sharafan at one or two meetings (Tr.5919, 5921).

[54] As TCC President Greg Neely puts it, they (Alee) "ran Sharifan right through the Commission." (Tr.1931).

200. So even if Alee hadn't wilfully and deliberately violated the Commission's partial settlement rules, and even if they hadn't abdicated control over their application, they would still be revoked for violating 47 USC 310(b) and then lying about it.[55]

201. In mitigation Alee claims that "[s]ince Alee received a construction permit, we constructed and are currently operating the cellular system in RSA Market No. 555A, New Mexico 3." This assertion is not persuasive. If Alee is contending that it has sunk a considerable amount of money into the New Mexico 3 RSA operation, the record doesn't support it. In fact, there is no proof that Alee has any subscribers of its own but is only providing, at most, roamer service. (Alee Ex.1; Alee Ex.3; Alee Ex.5; Tr.6399). Since there is no showing that Alee is furnishing any substantial service to the public, their mitigation assertion is summarily rejected. Their New Mexico 3 (Catron) RSA will be revoked.

TNT Communications

202. TNT Communications, a New Jersey general partnership has 21 general partners: (1) Dennis Arico; (2) Carl E. Bartlett; (3) Leonard Boyd; (4) Kathleen Cook; (5) Anthony Cotone, Sr.); (6) John Cotone; (7) Thomas Czech; (8) Donald Dobbs; (9) George Edelstein; (10) Ruth Gebhardt; (11) Anthony Jeanette; (12) Stanley Kazima; (13) Diane Lombardi; (14) Anthony Marmorale; (15) Dennis Morgan; (16) Gregory Pagano; (17) Holly Papp; (18) Anthony Quagliano; (19) John Terhune; (20) Barbara Vitelli; and (21) Fred Yaggi. (Buckhead Ex.33, pp.5-6). All of TNT's partners are New Jersey residents except Yaggi. Yaggi lives in Goldsboro, Pennsylvania.

203. The guiding force behind the TNT partnership is Stanley Malecki. Malecki, a broker-dealer from Edison, New Jersey, was the sole owner of a securities business known as Chris Securities. He became a TCC broker in the fall of 1986, when he first learned about the cellular lottery process from Allan Kane (Tr.4404, 4412).

204. Malecki began marketing and investing in RSA applications in 1987. His method of operation was almost identical to Allan Kane's. Malecki likened the concept of buying applications and later grouping them into alliances to reduce risk to an investor diversifying his investments over many stocks through a fund for the purpose of reducing the risk (Tr.4426). Malecki formed his RSA partnerships on this general premise. Since the original MSA alliance concept was no longer allowed, shifting to partnerships would create broader diversification of investment. Instead of individuals applying for only five, ten, or fifteen individual territories, each partnership would now apply for all 428 territories throughout the country, thereby increasing the chances of a win and minimizing the risk of investment loss (Tr.4431).

205. Malecki's office created 5 partnerships; (1) Edison Cellular;[56] (2) Cel-Tel Communications; (3) Zephyr Tele-Link; (4) Mobile Bell Communications; and (5) TNT Communications. The investors' interests in their partnerships were determined using the same formula Kane used (Tr.4430-4431).

206. Malecki either sent out copies of the respective partnership agreement of the relevant investor or had them come to his office to sign the partnership agreements (Tr.4459-4460). The partnership agreement named Stan Malecki as partnership manager (Tr.4442). The partners did not elect Malecki to that position (Tr.4442). Nor did they have any voice in who was selected as signing partner. Malecki generally appointed Chris Securities' brokers as the partnerships' designated signers. Thus, Malecki himself (who had an ownership interest in Edison Cellular) served as signing for Edison Cellular (Tr.4491); Renee Malanga was appointed the signing partner for Cel-Tel Communications (Tr.4489); Geral Cotter served as Mobile Bell's signing partner (Tr.4491); Charles Ferrarese was Zephyr's signing partner (Tr.4489); and Anthony Cotone Sr. served as TNT's designated signer.

207. Anthony Cotone Sr. (Finding 202(5) and 206 *supra.*), a financial planner is an agent and representative of Chris Securities. He sells various financial products, and is currently selling life and health insurance (Tr.4944-4945). Cotone works out of Malecki's office.

208. Cotone first heard about cellular in early 1987 at a meeting of Chris Securities representatives held at the Coachman's Inn in Cranford, New Jersey. He attended both as a potential broker for cellular applications and as a potential investor (Tr.4946-4948). At that meting Nick Wilson described the MSA alliances, and how attractive they were (Tr.4949). Wilson told Cotone that alliances were going to be allowed in RSAs. Stan Malecki told the assembly that purchasing more markets and entering an alliance would reduce risk (Tr.4426). Cotone has no experience in the communications industry.

209. Cotone decided to do two things. First he decided to invest in RSAs, and secondly he decided to sell cellular applications to his existing clients. He had clients in New Jersey and Pennsylvania with whom he had previous dealings, dealings involving life insurance, mutual funds, limited partnerships, and annuities (Tr.4953-4954).

210. With Malecki's approval Cotone sold cellular applications to his existing clients. He received his TCC brochures and sales information either directly from TCC or from Malecki. He received his commissions from TCC (Tr.4956-4958). Then, in early 1988 Cotone learned (from Malecki) that the FCC was going to disallow the alliance plan but that TCC had devised a surrogate business plan that would accomplish the same result (Tr.4955).

211. On April 27, 1988, Cotone attended the infamous Allan Kane seminar in Cranford, New Jersey, where "the business plan" was discussed (Tr.4956). There he learned a number of partnerships would be formed which would agree to share profits (Tr.4957). Cotone remembers hearing odds that if there were ten linked partners, the chances would be a million to one that they wouldn't win at least

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[55] In addition, Alee represented that one of its general partners was Kandace Dolphin. She wasn't. The true partner was Cellular Dreams. William Franklin admits that this should have been disclosed in a 47 CFR 1.65 amendment he filed in 1989 (Tr.2642). Further during the fall of 1988, Alee also transferred Agnes Jones' partnership interest in Alee to Mobile Bell Communications in violation of 47 CFR 22.922 (Finding 177 *supra).* This lack-of-candor demonstrates that Alee is an applicant not worthy of mitigation.

[56] See Footnote 2 *supra.*

one market (Tr.4957).[57] Additionally Cotone was given a piece of sales literature, a "green book" that fully described and promoted "linkage" and the risk-sharing concept.

212. After the April 27th seminar, Cotone continued selling RSAs (Tr.4966). Sometimes he would use the diagrams in the "green book" illustrating the linkage concept to persuade clients to purchase RSA investments (Tr.4962). In fact Cotone had some clients who had decided not to purchase RSA applications because of lack of alliances. But when Cotone explained linkage and risk-sharing to them, they changed their minds (Tr.4970).

213. In February 1988, Cotone, Sr. had purchased 25 applications along with his son, Anthony Cotone, Jr. (Tony). Once revenue sharing became an integral part of TCC's proposal, he had his son placed into another partnership, Edison Cellular. He continued to hold 4% of TNT.[58] Cotone discussed with Malecki that he would like TNT to consist primarily of his (Cotone's) clients (Tr.4993).

214. TNT was formed in June, 1988. It is a general partnership for applying in RSA cellular markets (TNT Ex.2A). On August 10, 1988 and again on October 4, 1988, Anthony Cotone, Sr. signed numerous TNT applications, including the North Dakota 3 - Barnes RSA application and the Puerto Rico 5 - Ceiba RSA application. Those applications were accepted for filing on September 9, 1988 and November 10, 1988 (Buckhead Exs.19, and 33).

215. There was a subsequent meeting held on September 9, 1988 at Chris Securities. There risk-sharing was discussed again (AALA/CFL Ex.128, Tr.4638, 4971-4972). There the TNT partners were briefed on the profit-sharing plan and the opportunity to have additional partnerships from their profit-sharing plan to reduce risks further. Malecki sent a letter to the TNT partners who did not attend, explaining the plan, and stating "that the only way to reduce the partnerships' risks and the individual risks as well as increase the opportunity to participate in potentially a greater number of RSA Market Awards would be to enter the Profit-Sharing Program." (CCB Ex.68, Pg.ED1-08-0126). Malecki's letter also explained that linking with the Florida partnerships would "substantially reduce the partnerships' risks."

216. Malecki then afforded the TNT partners the chance to vote on whether they wanted to join the profit sharing agreement (Tr.4978-4980, AALA/CFL 131). The ballot Malecki employed was the same as the one Allan Kane used for his partnerships (See Finding 88 *supra*.). The TNT partners voted unanimously in favor of linking with both the New Jersey and Florida partnerships (Tr.4982).

217. After the unanimous favorable vote Malecki presented Cotone with the Execution Page of the Agreement on either September 16 or 17, 1988 (Tr.4988). Cotone signed that page, and Stan Malecki witnessed his (Cotone's) signature (CCB Ex.2, Participant 19; Tr.4982). Cotone was fully aware that he was TNT's designated signer and that the page he signed was part of the risk-sharing agreement (Tr.4532; Finding 206 *supra*).

218. On April 13, 1989, TNT was selected as the tentative winner of the North Dakota 3 (Barnes) RSA. Shortly thereafter, on June 13, 1989, the TNT partners were invited to a seminar for Malecki partnerships which had won lotteries (CCB Ex.65; Tr.4508). Among the topics discussed was risk-sharing. Cotone attended. He didn't hear anyone at the meeting deny being a member to the risk-sharing agreement (Tr.4998-4999).

219. On August 25-27, 1989, Cotone, along with Allan Kane, and Stan Malecki attended an industry cellular conference in Westfield, Virginia (Tr.1848-1850). It was at this conference that Cotone first heard a recommendation that MCRSA be disclosed to the FCC (Tr.5004-5005). On the drive back to New Jersey, Cotone also discussed disclosure with Kane and Malecki (Tr.5006-5007). They all agreed the MCRSA should be disclosed. After returning to his office, Cotone told his clients about the disclosure recommendation (Tr.5005).

220. On September 20, 1989, TNT won its second lottery. They were named the tentative selectee for the Puerto Rico 5 (Ceiba) RSA (CCB Ex.311).

221. After the Westfield conference, Cotone received a letter from the law firm of Brown, Finn and Neitert. The letter, dated October 4, 1989, addressed the need for winning applicants to disclose the agreement (Tr.5010-5011). Thereafter, Cotone signed a minor amendment that disclosed the MCRSA's existence to the FCC, and stated that TNT is a party to that agreement. The TNT disclosure amendment is dated January 8, 1990.

222. No sooner had Cotone filed the TNT amendment than he began to hear about recommendations to rescind the MCRSA (Tr.5019). Malecki recommended to Cotone that TNT rescind the agreement. Cotone believed that rescinding the agreement would help their case before the FCC and allow them to participate in relotteries (Tr.5020). Malecki than sent letters to all the TNT partners telling them that legal counsel had recommended that they rescind, and enclosing a ballot for the purpose of voting on rescission (AALA/CFL Ex.142; Tr. 4699-4700, 5023). At least two-thirds of TNT's partners voted to rescind.

223. *Intermediate Facts.* TNT lacks the basic qualifications to be a Commission licensee. They have wilfully and deliberately violated 47 CFR 22.33 by entering into partial settlement agreements with other non-wireline RSA applicants.

224. They have wilfully violated 47 CFR 22.921 by amassing multiple ownership interests in pending RSA applications. They have violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

225. Equally important TNT has both violated 47 CFR 1.65 (failure-to-report) and the certification section of 47 CFR 22.923(b)(7). On August 10, 1988, Anthony Cotone certified TNT's North Dakota 3 (Barnes) RSA application. He averred that there were no understandings or agreements not disclosed in the Barnes application which grants anyone else a direct or indirect ownership interest.

226. Yet he knew at the time that TCC had plans in the works to implement a surrogate business plan that would accomplish the same result as the now-banned MSA alliances. And about a month and a half later (around September 17, 1988) he signed the Execution Page of the Mutual Contingent Risk Sharing Agreement (MCRSA). Cotone knew or should have known (ala Malecki) that this

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[57] Compare with Finding 21(1), 21(2) and 22(1) *supra*.

[58] "TNT Communications" derives its name from "Tony and Tony."

decisionally significant event should have been reported to the FCC pursuant to 47 CFR 1.65. Yet TNT did nothing. On April 13, 1989, TNT was selected as the tentative winner of the North Dakota 3 (Barnes) RSA. Still TNT did not disclose. It was not until January 8, 1990 that TNT disclosed that they were a party to the MCRSA.

227. Cotone's handling of TNT's Puerto Rico 5 (Ceibo) RSA application is even more egregious. On or around September 17, 1988, Cotone signed the Execution Page of the MCRSA on TNT's behalf and with partnership approval. Less than a month later he certified in the Puerto Rico 5 application that there were no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect ownership interest. This is outright deceit. On September 20, 1989, TNT won its second lottery; i.e., they were named the tentative selectee for the Puerto Rico 5 RSA. Still TNT (and Cotone did nothing). It was not until January 8, 1990 that TNT finally disclosed to the FCC that they were a party to the MCRSA.

228. TNT raises the two standard mitigating defenses. First, Cotone tries to transfer the blame for his transgressions to attorney William Franklin. He says "I had no previous experience regarding the FCC's rules, and I relied on Mr. Franklin's advice in deciding to approve TNT Communications' participation in the profit-sharing agreement described at the September meeting." (TNT Ex.2, p.2).

229. The defense is rejected. In the first place, William Franklin was not Cotone's (TNT's) counsel at the time of the September meeting. Even *assuming* he was, it is hornbook law that "advice of counsel is not dispositive of a licensee's (or permittee's) responsibilities." See e.g. *Inquiry into WBBM-TV's Broadcast of November 1 and 2, 1967 Report on a Marijuana Party*, FCC 69-537 released May 16, 1992 at page 18, Footnote 12.

230. Finally, the record evidence demonstrates that it was not William Franklin that the TNT partnership relied on. It was TCC broker Stan Malecki and TCC sub-broker Anthony Cotone that TNT placed their faith in. It was Malecki and Cotone that did the job on them.

231. Secondly, Cotone complains that he never read the risk-sharing agreement before he signed the Execution Page. This defense is also rejected. In the first place if a financial planner who sells, among other things, health and life insurance, and is charged with understanding the text and meaning of business documents, doesn't read a legal agreement before he signs it, it is his own fault. This record shows that Cotone didn't read the MCRSA because he never asked for a copy of it.[59]

232. Based on the foregoing (Findings 202-231 *supra.*) TNT's applications for the North Dakota 3 (Barnes) RSA and the Puerto Rico 5 (Ceibo) RSA will be denied.

Cel-Tel Communications

233. Cel-Tel Communications, a New Jersey general partnership, has 22 partners: (1) Patricia Casey; (2) Joseph Croot, Jr.; (3) Francis Delorme; (4) Michael Diana, Jr.; (5) Sharon Dymnioski; (6) Helen Farrarese; (8) Karon Graf; (9) Carla Guignard; (10) Anthony D. Gonnette; (11) Karen Jones; (12) William Jordan; (13) Deborah Journalist; (14) Dana Kelly; (15) Renee Malanga-Wise; (16) Margaret McCoy; (17) Francis McSweeney; (18) Leonard Narushinsky; (19) Vincent Piacquado; (20) Peter Puglese; (21) Leona Searing; (22) Dalores Sosna; and (23) Judith Wilson. (Buckhead Ex. 22).

234. The formulator of and guiding force behind Cel-Tel Communications is TCC broker, Stanley Malecki (See Findings 203-206 *supra.*). As previously noted (Finding 206 *supra.*), Malecki selected Chris Securities broker, Renee Malanga-Wise (Finding 233 (15) *supra.*) as Cel-Tel's signing partner.

235. Ms. Wise has been a Chris Securities registered representative for about 10 years. She has an insurance license, and a brokerage license for investments such as mutual funds and limited partnerships, but excluding individual stocks and securities. Ms. Wise was also a colleague of Allan Kane, and received his mailings (Tr.4413-4414, 5126-5129, and 5143).

236. Ms. Malanga-Wise had sold MSA alliances to her clients. She understood the "alliance" concept and made sales presentations about the concept to those clients (TR.5132, 5142). She attended the meeting of the Chris Securities representatives held at the Coachman's Inn in Cranford, New Jersey in January 1987 (See Finding 208 *supra.*). At least 40 Chris Securities' agents attended that meeting, a meeting designed to familiarize the attendees with TCC applications so that they would be able to offer them to clients.[60]

237. Shortly thereafter, Ms. Malanga-Wise decided to do two things. First, she decided to invest in RSA cellular applications, and secondly, she decided to sell RSA applications to her clients. She soon learned that alliances were not going to be allowed in the RSAs, and she was aware that the lack of alliances would certainly affect to whom and to what extent she would recommend the investment (Tr.5141).

238. In April 1988, Wise learned about TCC's business plan. Greg Neely told her that the partnerships would be linked, and that the business plan would enhance the potential of the RSA applications (Tr.5136, 5146). She attended the Allan Kane sponsored seminar on April 27, 1988 (Findings 211 *supra.*). She received a copy of the "Green Book'" a document that fully described and promoted "linkage" and the risk-sharing concept. Ms. Malanga-Wise believes that the TCC business plan described at the meeting made cellular applications "a more attractive investment" and "easier" to sell (Tr.5146).

239. After the April 27, 1988 seminar, Ms. Wise went back to her clients who had already purchased applications and described the linkage or business plan. She used the green book in her sales presentations (Tr.5154). All of her clients increased their investment citing the linkage or business plan as part of their investment (Tr.5154, 5156, 5218).

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[59] Written contracts are an integral part of a financial professional's (insurance broker, stock broker, financial broker, etc.) livelihood.

[60] Malanga says that only six brokers elected to add cellular applications to their repertoire of products -- herself, Kane, Malecki, Anthony Cotone, Steve Neidzielski and one other (Tr.5139-5140).

240. Cel-Tel was formed in June 1988 for the purpose of applying in RSA cellular markets (Cel-Tel Ex.2A). So the Cel-Tel clients were aware of risk-sharing before they committed to filing in all RSA markets (Tr.5179).

241. There was a subsequent meeting held on September 9, 1988 at the Chris Securities' office in Edison, New Jersey. There risk-sharing was again discussed. There the Cel-Tel partners were briefed on the profit-sharing plan and about the opportunity to have other partnerships join the plan thereby reducing risks further.

242. Malecki (and Ms. Wise) then afforded the Cel-Tel partners a chance to vote on whether they wanted to join the profit-sharing agreement, and whether they wanted to expand the scope of the agreement to include the Florida applications. All the Cel-Tel partners received ballots, the same one Allan Kane used (See Findings 88 and 215 *supra.*). The Cel-Tel partners unanimously voted in favor of entering the MCRSA and joining with the Florida group.

243. Malecki then sent Malanga-Wise the Execution Page of the MCRSA for her signature (Tr.5168, and Finding 234 *supra.*) on or about September 21, 1988. He told her to sign it and send it by Federal Express to TCC. She did (Tr.5175). At the time she signed, Ms. Wise knew it was the signature page for the risk-sharing agreement and that she was signing on behalf of her Cel-Tel partners.

244. About a month later, on October 28, 1988, Renee Malanga-Wise signed a host of Cel-Tel applications, including one for the Hancock, Ohio (5) RSA (Buckhead Ex.22; Tr.5253). There she certified that "there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indicator direct ownership interest. . ."

245. Malecki kept his partnerships (including Cel-Tel) informed about which of their linked partnerships had won RSA lotteries (Tr.4505). For example, on December 30, 1989 he wrote to his partnerships. He told them that the Florida and New Jersey group had won 3 lotteries as of that date (CCB Ex.69, pg. TNT-11-006; Tr.4505). Malecki also received calls from partners in his partnerships, wanting to know if any linked partnerships had won lotteries, and rejoicing when they had (Tr.4509).

246. On December 13, 1989, Cel-Tel was chosen as the tentative selectee in Hancock, Ohio (5) RSA. Meanwhile, in November, 1989, Malecki told Ms. Malanga-Wise that they needed to disclose the existence of the MCRSA to the FCC (Tr.5181). On January 16, 1990, Cel-Tel filed an amendment, signed by Ms. Malanga-Wise, informing the FCC that Cel-Tel was a party to the MCRSA; i.e., a multilateral agreement (AALA/CFL Ex.173; Tr.5207).[61]

247. Immediately after Cel-Tel disclosed the existence of the risk-sharing agreement to the FCC, Malecki told them that it would be advisable for them to rescind (AALA/CFL Ex.142; Tr.5238-5239). He sent them a letter, along with rescission ballots. There Malecki said "It is in the best interests of the partnerships to such [contingent mutual risk-sharing] agreements to exercise the voluntary termination provisions of those agreements" (AALA/CFL Ex.142; Tr.4699-4700). Cel-Tel then voted to rescind the MCRSA (Tr.5222).

248. *Intermediate Facts.* Cel-Tel Communications lacks the basic qualifications to be a Commission licensee. They have wilfully and deliberately violated 47 CFR 22.33 by entering into partial settlement agreements with other non-wireline RSA applicants. They have wilfully violated 47 CFR 22.921 by amassing multiple ownership interests in pending RSA applications. And they have violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

249. Equally important, Cel-Tel has falsely certified their applications in violation of 47 CFR 22.923(b)(7). On October 28, 1988, general and signing partner, Renee Malanga-Wise signed a host of Cel-Tel applications, including one for the Hancock, Ohio (5) RSA. There she certified that "there are no agreements or understandings other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest."

250. As a TCC sub-broker Ms. Malanga-Wise knew that certification was false. She knew, because just the month before, on or about September 21, 1988, she had signed the Mutual Risk Sharing Agreement (MCRSA) on Cel-Tel's behalf.

251. Moreover, Cel-Tel (Wise and Malecki) then compounded their deceit by concealing their participation in the MCRSA from the FCC until January 16, 1990. This egregious and deliberate violation of 47 CFR 1.65 forms a separate and independent reason for denying Cel-Tel's Hancock, Ohio (5) RSA application.

252. Cel-Tel raises the two standard mitigating defenses, both of which are rejected. First, Ms. Malanga-Wise tries to transfer the blame for her peccadillos to then TCC attorney, William Franklin. This is rejected. Ms. Malanga-Wise was well aware that Franklin was not Cel-Tel's attorney at the time. Even *assuming* that he was, it is hornbook law that "advise of counsel is not despositive of a licensee's (or permittee's) responsibilities." And finally the record evidence overwhelmingly supports the proposition that it was Stan Malecki that Ms. Malanga-Wise relied on, not William Franklin.

253. Next, Ms. Malanga-Wise states that she didn't read the MCRSA before she signed it, and that the terms of the MCRSA are not what she and her Cel-Tel partners thought they were agreeing to.

254. This assertion is also rejected. She never read the MCRSA, because she never made any effort to read it. She never asked for a copy of it (Tr.5169, 5176). Malanga-Wise worked for Malecki, and he had a copy of the MCRSA (Tr.4471). Her colleague Allan Kane had a copy of it. So if she didn't read the MCRSA, the fault lies with her alone.

255. Moreover, Ms. Malanga-Wise then went through the motions of disclosing to the FCC a document she hasn't read. And she later voted to rescind a document she hadn't read. This scenario borders on the incredible.

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[61] By letter dated December 7, 1989, and by *Public Notice* dated December 8, 1989, the Chief, Mobile Services Division notified the public that it was setting aside certain specified RSA grants "pending staff investigation" because of "possible rules violations."

256. Based on the foregoing (Findings 233-255 *supra.*), Cel-Tel Communications' application for the Hancock, Ohio (5) RSA will be denied.

Algreg Cellular Engineering

257. Algreg Cellular Engineering (Algreg) is a sole proprietorship. It is the trading name of Greg Neely, who is and always has been Algreg's sole principal. Neely is also President of TCC, and Chairman and CEO of Crystall Communications, Inc.[62]

258. Algreg's application for the Alabama 1 (Franklin) RSA was one of 428 RSA applications that TCC prepared for Neely. Neely paid TCC nothing for preparing the applications. Neely notes that other TCC executives also filed RSA applications for free; and that this was a prerogative of TCC's executive group since "we were the ones doing all the work" (Tr.1810-1811). However, Neely further notes that he paid his own filing fees for Algreg's applications (Tr.1813).

259. The Background (Findings 12-79 *supra.*) details Neely's relationship with Nicholas Wilson, Kent Maerki, and the various TCC brokers. It also describes the leading role Greg Neely played in developing a "business plan" that would circumvent the Commission's allocation rules. Thus, his role as President of TCC, the application preparer and his role as a cellular applicant are so intertwined, that what he did as a TCC executive automatically impacts on his 428 Algreg applications.

260. Stated another way, Greg Neely was so intimately involved in the evaluation of the TCC profit-sharing plan as well as in the development of the MCRSAs, that this conduct alone warrants denial of Algreg's Alabama (1) Franklin RSA. However, certain of the background facts will be recapped and additional findings pertinent to the Alabama (1) Franklin RSA application will be set out.

261. Neely was with TCC from its inception in 1984. Even before TCC was formed he was an accountant for Nicholas Wilson. In January 1985, Neely became TCC's Secretary-Treasurer, and TCC's President in August, 1987 (See Findings 19 and 32 *supra.*). This means that Neely was a TCC executive on November 13, 1985 when the United States District Court tried to restrain TCC from misrepresenting what it could do for MSA cellular lottery applicants (Finding 21 *supra.*). Neely was also a TCC executive at the time TCC entered into a consent decree with the Internal Revenue Service (Findings 22-25 *supra.*).

262. After becoming President of TCC, it was Greg Neely who developed a profit-sharing plan among applicant partnerships and coined the term "link partnerships" to describe and promote it (Tr.1593-1594). Neely admits the underlying purpose of his plan was to reduce the chance of investors losing their entire investment (Tr.1594). Neely knew, even *before* William Franklin drafted the MCRSA that TCC had already sold 11,500 RSA applications (Finding 33 *supra.*); that those RSA investors had purchased their applications under the assumption that there would be a plan by whatever name (alliances, linkage, business plan, risk-sharing) that would achieve the same results that MSA alliances had (Findings 31-35 *supra.*); that if such a plan were not implemented, the clients' money would have to be refunded (Finding 35 *supra.*) and that TCC did[63] not have the funds to give the money back (Finding 36 *supra.*).

263. So it was Neely himself who introduced the link partnership concept to TCC clients at a seminar in Cranford, New Jersey on April 27, 1988, who promoted the concept at seminars in Florida during the Spring of 1988, and who explained the concept to TCC brokers Doc Scott, and EJM's Edward Massey (CCB Ex.15; CCB Ex.78; Tr.1593, 1605, 1638-1639, 1645-1646, and 8729-8730).

264. Greg Neely, on behalf of Algreg Cellular, signed the MCRSA sometime between September 16-19, 1988 (Tr.1720-1721, 1741, 1759; and CCB Ex.25). He received three pages from John Dudeck, a TCC broker in Florida, and he was the last to sign on the page. He then sent the pages to Franklin (Tr.1758-59; CCB Ex. 25). Neely intended that Algreg would be part of the risk-sharing program when he signed (Tr.1817). He took all the necessary steps to enter Algreg into the East Coast MCRSA (Tr.2166). Allan Kane was in charge of obtaining all the other signatures (Tr.1763).

265. Neely signed his 428 RSA applications on or about October 17, 1988. He signed his Alabama (1) Franklin RSA application on October 17, 1988, and filed it on November 3, 1988 (Buckhead Ex.2; Tr. 1814). There he certified that "there are no agreements or understandings, other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." At the time he certified he was aware that just one month before he had entered into a risk-sharing agreement (Tr.1815).

266. On or about August 23, 1989, the Commission notified Algreg (Neely) that he had been selected as the tentative winner of the Alabama 1 (Franklin) RSA (CCB Ex.311). Meanwhile TCC and its brokers were trying to decide whether or not to disclose the existence of the Agreement to the Commission. Meetings were held, letters were written, phone calls were made. For example, disclosure was a topic at the August 25-27, 1989 Westfield Conference (See Finding 218 *supra.*). And on October 17, 1989, Neely and Rick Brown (Brown, Finn and Neitert)[64] met with TCC brokers Allan Kane, Stan Malecki, Eric Leong, Tye St.James and John Dudeck at the Newark airport. They discussed disclosure to the FCC at this meeting. They also discussed telling the brokers' clients about what they intended to do (Tr.2134). Brown, Finn and Neitert offered to represent the MCRSA members through the disclosure process (CCB Ex.35, the first 3 pages; Tr.1882-1883).[65]

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[62] Crystall (with 2 "l"s) was a corporation formed to pick up where TCC left off. It held itself out as being a cellular construction and management company (Tr.1822, 4135). However, it never really got off the ground. For by the time it was formed and organized, TCC's sordid scheme to ignore and circumvent the Commission's cellular allocation rules had surfaced, and was under Commission investigation. Crystall may well have been formed to slip out from under the terms of the FTC's consent decree.(See Findings 21-24 *supra.*)

[63] This is the key to the whole sordid picture. TCC, and its brokers (Kane, Malecki, Dudeck, Scott *et. al.*) had made substantial sums of money on the premise that there would be an alliance program. And they were either not willing or unable to refund those substantial sums to the RSA investors.

[64] By this time Brown, Finn and Neitert had become TCC's attorneys.

[65] The Brown, Finn, and Neitert law firm evidently believed that as long as the MCRSA members also decided to disclose,

267. On October 25, 1989, Algreg (Neely) disclosed the existence of the MCRSA to the FCC (AALA/CFL Ex.7; Tr.1888). On December 20, 1989, William Franklin wrote a letter to Allan Kane, John Dudeck and Stan Malecki. He let them know that the West Coast group (Scott, St.James, and Eric Leong) had rescinded their MCRSA (Tr.261, CCB Ex.38). During the first quarter of 1990, Neely wrote a letter to all the East Coast participants. He advised them to stick together during the FCC proceeding (CCB Ex.60; Tr.1885-1888, 2262; and Footnote 60 *supra.*).

268. *Intermediate Facts.* Algreg Cellular lacks the basic qualifications to be a Commission licensee. Its sole proprietor, Greg Neely, has wilfully and deliberately violated 47 CFR 22.33 by entering into partial settlement agreements with other nonwireline RSA applicants. It has wilfully amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921. And it has wilfully violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

269. Equally important, Algreg has falsely certified their applications in violation of 47 CFR 22.923(b)(7). Greg Neely signed Algreg's Alabama 1 (Franklin) RSA application on October 17, 1988. There he certified that "there are no agreements or understandings other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest." At the time he so certified, he was well aware that just the month before he had entered into the Mutual Contingent Risk Sharing Agreement (MCRSA).[66]

270. Moreover, Algreg (Neely) then compounded his deceit by deliberately concealing his participation in the MCRSA until October 25, 1989. This egregious, wilful violation of 47 CFR 1.65 forms a separate and independent reason for denying Algreg's Alabama-1 (Franklin) RSA application.

271. Algreg offers no mitigating circumstances worth analyzing or considering.

Jaybar Communications

272. Jaybar, a Florida General Partnership has 25 general partners: (1) Kyle D. Barnes; (2) Helen Barnes; (3) Bill Butler, Jr; (4) Robert Cellini; (5) Thomas Crossfield; (6) James Douglas; (7) Barbara Dudeck; (8) Donald Fair; (9) Tom Ferlita; (10) Richard Flippen; (11) Susan Hadden; (12) Ronald Haglund; (13) Allan Hammel; (14) Robert Hewell; (15) C. Ray Hornbaker; (16) Anthony Juliano; (17) Phillip Kittleson; (18) Tilson Lacy; (19) Donald Leas; (20) Roy Lindow; (21) Eugene Litten; (22) Edward Madley; (23) Jay McDuff; (24) Steve Stallard; and (25) Marvin Thorme.

273. The guiding force behind Jaybar is TCC broker, John Dudeck. Dudeck initially sold MSA applications for TCC.[67] Some of his Jaybar clients had purchased MSA applications from either John Dudeck or his [then] partner in Suncoast Communications, Donald Krueger. There was Allan K. Hammell (Finding 272(13)), Thomas Scott Crossfield (Finding 272(5)), Richard A. Flippin (Finding 272(10)), and Eugene Litten (Finding 272(21)). [68] All four men testified in this proceeding.

274. When John Dudeck started selling RSA applications, he told the investors that they would be in alliances. By the time alliances were prohibited most of his clients had already purchased their RSA applications. He heard Nicholas Wilson say that TCC was going to come up with a "business plan" that would achieve the same results as alliances (Tr.7147). This "business plan" became partnerships, and then linking or revenue-sharing partnerships (Tr.6900, 7317-7318, 7321).

275. On April 27, 1988, at the same time Allan Kane was holding his seminar in Cranford, New Jersey, John Dudeck put together a seminar at the Kapok Tree in Madeira Beach, Florida. There Kent Maerki explained the linking or profit-sharing plan in detail. At least four of Jaybar's general partners (Hemmell, Crossfield, Flippin, and Litten - See Finding 272 *supra.* attended the meeting. In addition to the full explanation each of them were given a copy of the "Green Book" (See Findings 238-239 *supra;* CCB Ex131; Tr.6899, 7052-7054, 7814).

276. John Dudeck also sold RSA interests (including an equity interest in Jaybar) to his wife, Barbara Dudeck (Tr.7545; Finding 267(7) *supra.*). She bought her interest in June, 1988, received a sales discount, and bought directly into the Jaybar partnership in order to assist her husband in completing the partnership (Tr.7546-7547).

277. However, the record evidence points to John Dudeck as being Jaybar's *de facto* partnership manager (CCB Tr.142; Tr.6931, 6979, 7555, 7575-7576, 7585-7586 and 7819). As Allan Hammell puts it "John Dudeck was providing guidance to the partnership, as well as he was on other partnerships" (Tr.6983). And Eugene Litten says that until the Jaybar Executive Committee was formed in March 1990, John Dudeck managed the partnership (Tr.7089-7090).[69]

278. Barbara Dudeck never saw the Jaybar partnership agreement. But she signed a signature page to it on June 27, 1988. Her signature was notarized by Susan L. Krueger. Susan Krueger is Don Krueger's wife; Don Krueger was at that time John Dudeck's partner (Finding 273 *supra.*) and a general partner in Pinellas Communications.[70]

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there would be no conflict of interest between TCC and the TCC brokers on the one hand and the MCRSA members on the other hand. Otherwise the law firm had no business making this offer.

[66] Neely's method of operation displays a consistent pattern of deceit. When the U.S. District Court's five directives interfered with TCC's sales efforts, he simply ignored them (Finding 21 *supra.*). When the Consent Decree's two directives threatened to interfere with TCC's sales effort, he ignored them (Finding 22 *supra.*). When the Internal Revenue Service case's terms proved burdensome, he ignored them (Finding 23 *supra.*). Rather than return the money to TCC's investors after making false representations to them, TCC and its brokers deliberately tried to run roughshod over the Commission's RSA allocation rules.

[67] It was while he was still selling MSA applications that John Dudeck learned about the FTC consent decree (Tr.7135 and Findings 21-23 *supra.*). So John Dudeck was aware from the outset that he was selling RSA applications based on sales representations which were suspect.

[68] John Dudeck himself was in MSA alliances, and believes the FCC should have continued using alliances (Tr.7140, 7142; also see Footnote 63 *supra.*).

[69] Brown, Finn and Neitert represented Jaybar from November 15-17, 1988 until November 6, 1989. Then Jaybar changed counsel to William Franklin (CCB Ex.143). On January 1, 1990, Jaybar changed counsel to Hopkins and Sutter (CCB Ex.144; Tr.7851).

[70] Dudeck and Krueger put together four partnerships: Suncell Gulfcoast, Jaybar and Pinellas. Dale Dudeck (John's son) put together and managed Florida cellular (Tr.7180, 7183).

279. Between July 1988 and January, 1989, Jaybar filed TCC-prepared applications in all 428 markets including Jaybar application for the Arizona 6 (Graham) RSA. Barbara Dudeck signed the Arizona 6 RSA application on July 18, 1988, and it was filed on July 29, 1988 (AALA/CFL Ex.227; CCB Ex.144A; and Buckhead Ex.35).

280. At the time she signed the Arizona 6 RSA application Barbara Dudeck certified ". . .that the statements made in this application are true, complete and correct to the best of [her] knowledge and belief, and are made in good faith." She also certified that ". . .this application . . . is complete in every respect and contains all the information required by FCC Form 401 and the Commission's cellular application rules."

281. It now develops that she did not have the complete application before her. She didn't have the engineering portion. In fact the only materials she had before her was "[t]he signing 401 sheet and there was another sheet" (Tr.7555-7556). She simply relied on her husband's assurances that the application would be completed later (Tr.7602).

282. At the time she signed the Arizona 6 RSA application, Barbara Dudeck certified "that there are no agreements or understandings other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest . . ." At the time she so certified she was fully aware that the Jaybar partnership was to become a part of a linked, risk-sharing program. Her husband had discussed linkage with her, and had also explained to her that it would increase her chance of winning in the cellular lottery (Tr.7324, 7553-7554).

283. In August 1988, TCC President Greg Neely contacted John Dudeck and told him TCC wanted to have a meeting in Florida. Neely indicated that there would be a TCC lawyer in attendance who would discuss the validity of the linkage program (Tr.7187).

284. Dudeck set up a meeting for August 24, 1988, and it was held at his Suncoast Communications Office (Tr.7188-7189). There William Franklin and Greg Neely discussed linkage; they discussed linking the Florida with the New Jersey partnerships; and they discussed the need *not* to disclose the existence of the MCRSA to the FCC (Tr.6910-6911, 6914, 7189, 7194, 7196, 7203, 7821-7823, and 7824-7826).[71]

285. The following day, August 25, 1988, John Dudeck and Krueger sent an explanatory letter and a ballot to each of Jaybar's partners. All of them except Richard Flippin voted in favor of joining the linkage program, and linking up with the New Jersey partnerships (Compare CCB Ex.155, with Jaybar Ex.1A, pp.13-37; Jaybar Ex.3; Tr.7559).

286. TCC sent the blank Execution pages of the MCRSA to John Dudeck shortly before the September 23, 1988 lotteries were held (CCB Ex.2, ii; Tr.7208). General Partner Barbara Dudeck then signed the Execution page for Jaybar, and Don Krueger (J. Dudeck's partner) witnessed her signature that executed signature page was sent to TCC before September 23, 1988. Mrs. Dudeck was aware that when she signed the signature page of the Execution document[72] she was committing Jaybar to become a member of the risk-sharing group. John Dudeck had told her that the Jaybar partners wanted her to sign the Agreement (Tr.7562-7563, 7589).

287. On November 9, 1988, Jaybar was picked to be the tentative selectee for the Arizona 6 (Graham) RSA. They did not disclose the existence of the MCRSA at that time (Tr.7564). After Jaybar won the lottery, John Dudeck became the manager advisor for Jaybar (Tr.7245-7246; AALA/CFL Ex.181). He sent out documents where he named Barbara and himself managers (CCB Ex.142).

288. TCC kept Jaybar informed about other wins in the linked chain. Jaybar held two partnership meetings on August 1, 1989, and August 18, 1989, where linkage and revenue-sharing were discussed. It was about this time that the subject of disclosure of the MCRSA to the FCC surfaced. On October 30, 1989, Jaybar disclosed to the Commission that it had entered into the MCRSA (AALA/CFL Ex.225; Tr.7577-7578).

289. Shortly thereafter, the subject of rescinding the MCRSA came up, and John Dudeck sent rescission ballots to the Jaybar partners. With the possible exception of Eugene Litten, the partnership voted to rescind (Tr.6932-6933, 7069-7073, 7579-7580, 7850; CCB Ex.144). Jaybar believed by voting to rescind, they were making relotteries viable (TR.6936).

290. A partnership meeting was held on February 22, 1990. There, among other things, the desirability of constructing and operating the Arizona 6 RSA system was discussed. They recognized that for the FCC ". . .to pull the license of an operating system takes quite a lot. . ." The partners also discussed the MCRSA and the fact that other partnerships had not rescinded the MCRSA (CCB Ex.134, p.2; Tr.6940, 7854-7855).

291. However, Jaybar did not begin construction of its system until after the MCRSA was under attack (Tr.6952). Then, upon advice of counsel, the partnership voted to proceed with construction (Tr.6952-6955). But the existing record hardly supports any mitigation plea based on construction and operation. In fact there is no way of telling whether the partnership has one red cent tied up in its Arizona 6 RSA. What appears to have happened is this: Jaybar entered into a contract with Metro Mobile; Metro Mobile has supplied some financing, holds a 5% option on the Jaybar license, and is currently operating and managing the Arizona 6 system (Tr.7569, 7860).

292. There is no concrete evidence about the scope of the Arizona 6 operation. Allan Hammell estimated that the system has between 50 and 75 subscribers. However, his fellow partner, Eugene Litten says that the construction of the system was completed just 24 hours before the expiration of the construction permit (Tr.7091); he is not sure who built and is operating and managing the system; and he doesn't know whether Jaybar is providing roamer services only, doesn't know if Jaybar has any subscribers, and doesn't know if any subscribers are being solicited (Tr.9092).

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[71] At least one Jaybar partner, Thomas Crossfield, was concerned that the agreement would not be disclosed to the Commission because, in his view, that would cast doubt on its validity (Tr.7834; 7888).

[72] Barbara Dudeck has never read, seen, or asked to see a copy of the "Terms and Conditions" portion of the MCRSA (Tr.7561, CCB Ex.2.).

293. *Intermediate Findings.* Jaybar lacks the basic qualifications to remain a Commission licensee. They have wilfully and deliberately violated 47 CFR 22.33 by entering into partial settlement agreements with other nonwireline RSA applicants. They have wilfully violated 47 CFR 22.921 by amassing multiple ownership interests in pending RSA applications. And they have violated 47 CFR 22.922 by indirectly transferring interests in pending RSA applications.

294. Equally important, Jaybar has falsely certified their applications in several respects in violation of 47 CFR 22.923(b)(7). When she signed, *inter alia,* the Arizona 6 (Graham) RSA application on July 18, 1988, General Partner Barbara Dudeck swore ". . .that the statements made in this application are true, complete, and correct to the best of [her] knowledge and belief, and made in good faith." There is no possible way Barbara Dudeck could have made these averments in good faith. She didn't even have the application before her when she so certified. In fact, she only had two sheets of paper in front of her at the time. One was the 401 signing page, and the other was the transmittal sheet (Tr.7599).

295. She also misrepresented when she certified that "this application. . .is complete in every respect and contains all information required by FCC Form 401. . ." To the contrary, Barbara knew the application (those applications) were not complete, and she knew that what she had in front of her wasn't "complete" let alone "complete in every respect."

296. Moreover, Jaybar then compounded their deceit by failing to report the existence of the September 1988 MCRSA to the Commission until October 30, 1989. They deliberately failed to report a significant change in their application for over a year. This wilful and egregious violation of 47 (F.R. 1.65 constitutes still another reason for dismissing (revoking) Jaybar's Arizona 6 (Graham) RSA application.

297. Jaybar raises the feeble mitigation plea that they relied on attorney William Franklin's advice. That plea is rejected. The record reflects just the opposite. The Jaybar partners relied almost exclusively on TCC broker, John Dudeck. Barbara Dudeck, the signing partner, had no direct business contact with Franklin. She never even attended a seminar where he spoke. She concedes that the only basis for any reference in the testimony was information provided by her husband.

298. Based on the foregoing (Findings 272-297 *supra.*) Jaybar's license for the Arizona 6 (Graham) RSA will be revoked.

Pinellas Communications

299. Pinellas, a Florida General Partnership, has 21 partners: (1) Donald Bays; (2) Carolyn Carr; (3) Fletcher Gilders; (4) Mary Harding; (5) John Hoffman[73] (6) David Kahn; (7) Donald Krueger[73]; (8) Robert Martin; (9) Roderic Martin; (10) Harry Miller; (11) Zene Morlatt; (12) Augustine Nazarro; (13) Helen Ott; (14) Henry Philpot; (15) Dorothy Roberts[73]; (16) Henry Saylor; (17) Florence Schlageter; (18) Allan Stallard; (19) Graydon Terbush; (20) Raymond Wedler; and (21) Robert Baker (Buckhead Ex 24).

300. The formulator and guiding administrator for the Pinellas applications is TCC broker Donald Krueger (Finding 290(7) *supra.*) Krueger, at the times in question, was John Dudeck's partner at Suncoast communications (See Findings 273, 278, and 286 *supra.*) Kruger sold MSA cellular applications for TCC under the alliance concept, and he also invested in MSA alliances[74] (Tr.7365-7366, 7371). In fact most of the partners in Pinellas Communications had participated in MSA alliances. (Tr.7441, 7509-7510).

301. Krueger began TCC RSA applications in 1987. He shared office space and worked as a team with John Dudeck. The two shared the TCC title of regional directors (Tr.7368, 7364, 7376).[75]

302. Krueger learned, in correspondence from TCC that the FCC was banning alliances. This concerned Krueger since most of his former MSA clients had already made substantially all of their RSA investments by this point. However, TCC also told Krueger that they (TCC) had a business plan that would be implemented in place of alliances.

303. Consequently, on April 12, 1988, Krueger (and Dudeck) sent a letter to his clients, describing in part the TCC business plan (CCB Ex.150) in this way:

> "Dear Cellular Applications Owner:
>
> "CONGRATULATIONS
>
> "Your long and good natured patience has actually resulted in a most remarkable increase in the value of your original purchase of Cellular Territory applications.
>
> "It is as if your money during all this time has been earning greater opportunities. . .far beyond what was ever dreamed of prior to the initial program as presented by the Cellular Corporation.
>
> "Why should anyone settle for bank interest rates on their money, when their original intent was to 'Go for the Gold! in a nationwide program that has been referred to by several economists as 'the Greatest Financial Opportunity of the Century.'
>
> "In our view, the resultant potential monetary values, with substantial increase of same, as a result of changed government 'formulas' is nothing short of a 'Bonanza'!. .
>
> ". . .A lot more on that at our seminar this 27th of April at the Kapok Tree on Duhme Road, in Madeira Beach, Florida. . . ."

304. The investors who attended the Kapok Tree meeting (See Finding 275 *supra.*) learned about the plan to form partnerships to apply in all 428 RSA cellular markets, and

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[73] John Hoffman (Para.294(5)), Donald Krueger (Para.294(7)) and Dorothy Roberts (Para.294(15)) testified at the hearing.

[74] Donald Krueger won minority interests in five of the seven MSA alliances he invested in. His wife, Susan Krueger (See Finding 273 *supra.*) also won a minority interest in an alliance she participated in (Tr.7372).

[75] Kent Maerki (See Findings 18-19 and Footnotes 11-12

about the plan to link the partnerships and share the profits. They also received a copy of the "Green Book" (CCB Ex.131; Tr.11806).[76]

305. The Pinellas partnership was formed on May 23, 1988 for the purpose of applying in RSA cellular markets. Donald Krueger selected himself as Pinellas' initial manager and signing partner (Pinellas Ex.4A; Tr.7182-7183, 7407-7408).

306. On August 24, 1988 (See Finding 284 *supra.*), Krueger helped sponsor the seminar held at Suncoast Communications. There William Franklin and Greg Neely discussed both linkage and linking the Florida with the New Jersey partnerships. The consensus taken at the meeting was to link-up with the New Jersey partnerships (Jaybar Ex.2, ATT.3; Tr.7406-7407, 7446-7447, and 11,810).

307. After the Kapok Tree meeting Krueger called his Pinellas partners. He told what had happened at the meeting, and said that ballots would be sent to them on which they could vote on the risk-sharing agreement. He also told them that risk-sharing would increase the probabilities of winning a market, and that he (Krueger) was in favor of the linkage proposal (Tr.7439, 7441, 7444, and 7450).

308. The risk-sharing ballots were sent to the Pinellas partners. All of the Pinellas partners who voted, voted in favor of risk-sharing (AALA/CFL Exs.185, 186; Tr.7450-7453). After the Pinellas' partners approved Pinellas' entry into the risk-sharing agreement, Krueger signed the Execution Document making Pinellas a party to the MCRSA. John Dudeck witnessed his signature. This occurred before September 23, 1988. (CCB Ex.2; Tr.7455-7458; Finding 286 *supra.*).[77]

309. On November 5, 1988, Donald Krueger signed TCC prepared RSA applications for 428 markets including the Pennsylvania 2 (McKean) RSA application. There he certified that the statements made in the applications were true, complete and correct to the best of his knowledge and were made in good faith.

310. At the hearing it developed that he did not have the complete application before him at the time he certified, and that he took no steps to determine whether the statements that were before him were true, complete and correct. For example, he didn't have a financial exhibit before him when certified. He simply expected TCC to attach the financial exhibit when he sent the application back to them (Tr.7500-7507).

311. When he signed Pinellas' 428 applications on November 1988, Krueger certified that there were "no agreements or understandings, other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest." (Buckhead Ex.24, p.1). He so certified knowing full well that only a month and a half before, he had committed Pinellas to the MCRSA.

312. Pinellas' 428 applications were filed on December 9, 1988. TCC kept Krueger informed of every lottery win within the link group, and Krueger, in turn, kept his Pinellas' partners informed. In fact, on July 13, 1989, Krueger attended a meeting for all the Florida investors and received an up-date on the linked lottery winners (CCB Ex.142; AALA/CFL Ex.180, p.2; Tr.7479-7480).

313. On November 8, 1989, Pinellas won the Pennsylvania 2 (McKean) market. It was about this time that John Dudeck and Donald Krueger discussed disclosing the existence of the Pinellas Agreement to the FCC. And, even though he had never read the disclosure agreement Krueger agreed to do so (Tr.7281-7282, 7438-7439). It was TCC that had suggested that they disclose (Tr.7461). And on December 1, 1989, in an amendment signed by Krueger, such disclosure was made. Krueger never consulted his fellow Pinellas' partners regarding his disclosure (AALA/CFL Ex.187; Tr.7478).

314. A short time after the Agreement was disclosed, Dudeck told Krueger that Pinellas needed to rescind the agreement. Otherwise, said Dudeck, the application could be dismissed by the Commission. It was TCC's suggestion that Pinellas rescind the agreement (Tr.7461, 7467).

315. This was about the time that Krueger left Suncoast and voluntarily resigned as Pinellas' partnership manager. John Dudeck temporarily became partnership manager as of January 1, 1990 (Tr.7472-7474). So it was John Dudeck who sent a letter and a ballot to each Pinellas partner on January 12, 1990. The ballot called on each partner to vote on three items: (1) to make John Dudeck the new partnership manager as of January 1, 1990; (2) to change legal counsel; and (3) to rescind, void and terminate the Agreement (AALA/CFL Ex.180; Tr.7476-7477; 11815-11816). It appears that all of Pinellas' partners, except Dorothy Roberts, voted for rescission (Tr.12334, 12340-12341).

316. *Intermediate Facts.* Pinellas' application will be denied. They lack the basic qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other nonwireline RSA applicants in violation of 47 CFR 22.33. They have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921. And they indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

317. Equally important, Pinellas has falsely certified their applications in violation of 47 CFR 22.923(b)(7). On November 5, 1988, Donald Krueger signed 428 TCC-prepared RSA applications including the one for Pennsylvania (2) McKean. There he swore that all the statements contained in the application were true, complete and correct to the best of his knowledge and were made in good faith.

318. When he so certified, Krueger had absolutely no basis for doing so. He never had even one complete application out of the 428 he signed. He admits that he didn't have even one of the 428 financial exhibits before him. So Krueger was fully aware that his certification was false.

319. Moreover, when Krueger signed Pinellas' 428 applications on November 5, 1988, he certified that there are "no agreements or understandings, other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct owner-

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supra.) describes Dudeck and Krueger as part of a "hierarchy" of regional managers placed "strategically throughout the country" who represented TCC (Tr.4847-4848).

[76] Krueger and Dudeck hosted a number of seminars on RSA applications. The same type of information regarding the partnerships and linkage was presented (CCB Ex.129; Tr.7174, 7394, 7398-7399).

[77] 5.84% general partner Dorothy Roberts didn't vote. She was out of the country at the time the ballots were being cast (Pinellas Ex.3 p.1; Tr.12331).

ship interest." That certification was false, and Krueger knew it was false. He was fully aware that just a month and a half before, as Pinellas' manager, and signing partner, he had committed the partnership to the MCRSA. Such deceit cannot and should not be tolerated.

320. Next, Pinellas has violated 47 CFR 1.65. They entered into the MCRSA in September, 1988, but didn't bother to report its existence to the Commission until December 1, 1989. This egregious and deliberate rules violation forms still another separate and independent reason for denying Pinellas' application.

321. Pinellas' mitigation claims are baseless. Donald Krueger claims Pinellas relied on attorney William Franklin's advice. That claim, coming from a TCC broker and regional director, is ludicrous. Krueger is not now and never was a victim of TCC's scam. Rather he helped perpetuate the scam. He was a "scammer" not a "scamee."

322. He says he signed the MCRSA Execution page without ever having read its Terms and Conditions. That's Krueger's fault, and nobody else's. He was never denied access to the text of the agreement because he never asked for access (Tr.7434-7435). Moreover, after it had been executed there was a copy of the agreement available in the Suncoast offices (Tr.7206-7217-7218, 7224). His claim is not only inaccurate, it's inane.

323. Even if Pinellas had raised worthy mitigation claims, it is not the type of applicant that deserves equitable consideration. For Pinellas by its own admission has violated other Commission RSA rules, rules that were not even designated for hearing.

324. For example, Pinellas, by its own admission, admits that it violates 47 CFR 22.921(b); i.e., the prohibition on having interests in more than one application per market. Krueger's wife, Susan Krueger, also invested in RSA applications. She got involved when the Gulf Communications partnerships were being formed (Tr.7388-7389). Donald Krueger paid for his wife's partnership interest (Tr.7511). He candidly admitted that he knew that he could not have more than one interest and that his wife was named in a partnership instead of him to increase the Kruegers' chances (Tr.7512).

325. Based on the foregoing (Findings 299-324 *supra.*) Pinellas Communications' application for Pennsylvania 2 (McKean) RSA is denied.

Florida Cellular

326. Florida Cellular, a Florida partnership, consists of twelve partners: (1) Stephen Blume; (2) Michael Carter,[78] (3) Debbie Doran; (4) Dale Dudeck; (5) Patricia Heady; (6) William Hoenig; (7) Edward Koontz; (8) Paul Mizelle; (9) David Scott; (10) John Sellers; (11) Lynn Twedt; (12) Dina Wedler.

327. The chief organizer, and guiding administrator for Florida Cellular is Dale Dudeck, the son of TCC broker, John Dudeck. Dale Dudeck (Finding 326(4) *supra.*) attended Indian River Junior College in Florida (Tr.8160). Since 1984, he has worked, on and off, on a part-time basis for his father's firm, Suncoast Communications. He refers potential investors to various investments including real estate and a cattle embryo program (Tr.8161-8162).

328. Dale Dudeck began selling RSA applications in March of 1988, as a broker under his father at Suncoast (Tr.8164-8165). After John Dudeck learned that alliances were not going to be allowed, he had Suncoast sponsor the April 27, 1988 meeting at the Kapok Tree Restaurant (See Findings 270, and 303-304 *supra.*). Dale Dudeck attended that meeting. At that time Dale hadn't yet invested in RSAs, but Michael Carter (Finding 326(2) and Fn.78) had invested enough money to purchase five applications (CCB Ex.137A, Tr.8175-8177, 7156-7157).

329. Dale Dudeck not only invested in RSAs he sold equal portions of Florida Cellular by contracting people that he knew might be interested in applying for RSA licenses through a partnership (Tr.8186; FC Ex.1, p2). By June 22, 1988, Dale Dudeck had collected all the money from the Florida Cellular partners, $250,000 (Tr.8201, 8234). And on June 23, 1988, Florida Cellular's was formed for the purpose of applying in RSA cellular lotteries (FC Ex.1, Attach.1). Dale Dudeck was Florida Cellular's initial manager and signing partner (FC Ex.1, Attach.1, p.14; Buckhead Ex.9, p.5; Tr.8171).

330. Dale Dudeck also attended the subsequent August 24, 1988 investor's meeting at the Suncoast offices (Findings 283-284 and 304 *supra.*). There he heard Franklin talk about risk-sharing, and he learned about the proposal to link with the New Jersey partnerships. After the meeting he felt good about going through with risk-sharing (Tr.8181-8186). But he was also aware that there was a risk that the linkage would not be allowed (Tr.8186-8187, 8288).

331. After the August 24, 1988 meeting, Dale Dudeck explained the linkage concept to Carter and explained the profit-sharing concept to his other Florida Cellular partners. He told them that he thought it was a good idea (Tr.8192-8194, 7186). One of the advantages he pointed out to them was that Florida Cellular would participate in profits from other cellular wins even if they did not win a lottery (Tr.8274-8275, 8356).

332. Then Dale Dudeck sent ballots to all of his Florida Cellular partners. As of September 12, 1988, Florida Cellular agreed unanimously to enter the linkage program and join with the New Jersey group (F.C. Ex.1, p.5; FC Ex.3; Tr.8219).

333. Meanwhile, on September 6, 1988, and on behalf of Florida Cellular, Dale Dudeck signed TCC prepared applications for all 428 RSA markets, including an application for the Missouri 2 (Harrison) RSA. There he certified ". . .that there are no agreements or understandings other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." At the time he so certified, Dale Dudeck was well aware of the events surrounding the August 24, 1988 seminar. (See Findings 330-332 *supra.*).

334. After the Florida Cellular partners voted to enter the MCRSA, and in mid-September, 1988, Dale Dudeck signed the Execution page of the MCRSA. He received the

[78] Michael Carter is a broker under John Dudeck selling RSA applications (Tr.7169). Carter owns 50% equity in the Florida Cellular partnership. Carter sold his interest in Florida Cellular to himself.

signature page from his father at the Suncoast offices, and his father's partner, Donald Krueger, witnessed his signature (CCB Ex.2, Participant 5; Tr.8223, 8226; also see Findings 294-320 *supra.*) Dale Dudeck understood when he signed the Execution page that he was entering Florida Cellular fully into the linkage agreement (Tr.8224).

335. On June 28, 1989, Florida Cellular was drawn as the tentative selectee of the Missouri 2 (Harrison) RSA (CCB Ex.311).

336. Shortly after the Westfield conference (See Finding 261 *supra.*) in late August, 1989, Florida Cellular's counsel, Brown, Finn, and Neitert, told Dale Dudeck that the Risk Sharing Agreement was going to be disclosed to the FCC (FC EX.1, p.6, Tr.8239-8240). And in a memo dated October 25, 1989, Brown, Finn, and Neitert sent Dale Dudeck, in his capacity of Florida Cellular's signing partner, a memo on the disclosure of the Risk Sharing Agreement (CCB Ex.35; Tr.8243).

337. After receiving the Brown Finn memo, Dale Dudeck got permission from his partners to disclose to the Commission that Florida Cellular was a party to the MCRSA (AALA/CFL Ex.221, p.2). On October 26, 1989, Dale Dudeck signed a minor amendment whereby Florida Cellular disclosed to the Commission that it had entered into the East Coast MCRSA. However, that amendment wasn't actually filed with the FCC until November 14, 1989 (See AALA/CFL 221; Tr.8246). By that time Algreg (Greg Neely) had already disclosed the existence of the Agreement and the signatories thereto, including Florida Cellular (AALA/CFL Ex.7; Finding 267 *supra.*).

338. On November 20, 1989, the FCC issued Florida Cellular a construction permit for the Missouri 2 (Harrison) RSA, but set aside that construction permit on December 7, 1989, when they (the Commission) discovered that Florida Cellular was a member of the East Coast MCRSA (Tr.8250).

339. On January 2, 1990, William Franklin sent Dale Dudeck a memo. He told Dudeck that Petitions to Dismiss or Deny had been filed against the lottery-winning signatories to the risk-sharing agreement (AALA/CFL Ex.45, Tr.8253). Franklin also recommended that Florida cellular rescind the agreement (AALA/CFL Ex.45, p.3; Tr.8254). Dale Dudeck sent a form to all the partners asking them to agree to rescind. The Florida Cellular partners unanimously voted to rescind the Risk Sharing Agreement to which they were a party (AALA/CFL Ex.222; FC Ex.1, Attachment 4).

340. *Intermediate Facts.* Florida Cellular lacks the basic qualifications to become a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other nonwireline RSA applicants in violation of 47 CFR 22.33. They have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921. And they have indirectly transferred interests in pending RSA applications, thus violating 47 CFR 22.922. These violations either singularly, or in combination warrant a denial of Florida Cellular's application for the Missouri 2 (Harrison) RSA.

341. Equally important, when Dale Dudeck certified the Missouri 2 (Harrison) application on September 6, 1988, he was clearly less than candid with the Commission. He certified that there are "no agreements or understandings other than those specified in the application, which provide that someone other than the applicant shall have an indirect or direct ownership." Yet, even as he was certifying, Dale Dudeck knew that Florida Cellular was on the verge of becoming a party to the East Coast Mutual Contingent Risk Sharing Agreement (MCRSA). Knowing this Dudeck should have never made an *unqualified* certification. He owed it to the Commission to reveal what Florida Cellular was planning.

342. *Assuming* that Florida Cellular wasn't obligated to be candid with the Commission regarding their intentions, they were obligated to report the agreement's existence under 47 CFR 1.65 after they became a signatory. They entered into the MCRSA in mid-September 1988. But they didn't bother to report its existence to the FCC until November 14, 1989. And then they only reported it to the FCC after another signatory to the Agreement had already done so. This egregious and deliberate violation of 47 CFR 1.65 forms still another reason for denying Florida Cellular's application.

343. Florida Cellular's mitigation claims are so feeble as to be baseless. Dale Dudeck's attempt to blame Florida Cellular's predicament on attorney William Franklin borders on the ludicrous. At the time Florida Cellular entered into the MCRSA, Franklin wasn't their attorney, and Dale Dudeck knew it. Moreover, the record fully supports the proposition that Dale Dudeck relied primarily on TCC President Greg Neely's representations and secondarily on his father's (TCC broker) John Dudeck's advice.

344. Based on the foregoing (Findings 326-343 *supra.*) Florida Cellular's application for the Missouri 2 (Harrison) RSA is denied.

Bay Cellular of Florida

345. When Bay Cellular, a Florida general partnership, initially filed their RSA applications on December 2, 1988, they *represented* that they had 12 partners: (1) Salu Devnani - 21.58%; (2) Louis Powell - 16.7%; (3) Mary Jean Rainnie - 3.10%; (4) Louise Herz - 4.01%; (5) Genevieve J. Schiffman - 8.57%; (6) Alan Gilbert - 1.54%; (7) Joseph Maxie Jr. and Vivian R. Hull - 7.69%; (8) James L. Hough - 7.69%; (9) Tier One Venture Associates - 8.57%, (10) Gary M. Pickel - 7.69%; (11) Kendall R. Henry - 2.09%; and (12) William E. Childers - 7.69% (Buckhead Ex.7, p.6-7).

346. There are two or three problems with that representation. First the percentage figures don't total 100%. Rather they show ownership of 96.92%. However, the ownership interest of the signing General Partner, Maurice P. O'Connell, is not listed. O'Connell testified at the hearing that he had invested in what became Bay Cellular (Tr.7635). Moreover, he doesn't know why he wasn't listed as having an ownership interest (Tr.7668; also see 56 F.R. 28559 at paras. 26-27). So, by subtracting 96.92% from 100% and *assuming* that Maurice P. O'Connell owned the remainder,[79] then O'Connell's initial ownership was 3.08%.

347. However, at the hearing it developed that one of the original 13 partners, Mary Jean Rainnie, had pulled out of the partnership (Finding 340(3) *supra.*) and was no longer a partner. O'Connell claims that she pulled out early-on,

[79] Under the circumstances of this case that is a dangerous assumption.

in November of 1988; that he (O'Connell) purchased her 3.10% interest; and that he forwarded the transfer papers to Crystall Communications for handling (Tr.7641-7644). This claim must be rejected. The application for the Mississippi 5 (Washington) RSA, for example, was filed on December 2, 1988, and clearly lists Ms. Rainnie as a 3.10% stockholder, and Crystall Communications did not even come into being until March 1989 (Tr.4135-4136, Tr.1820).[80] [81]

348. Next, the so-called Rainnie to O'Connell transfer wasn't reported to the Commission until March 26, 1990; i.e., well after the Commission's investigation was well under way.[82]

349. So, even before we look at the facts underlying the MCRSA. We see that Bay Cellular has openly and deliberately violated 47 CFR 22.922 which prohibits the transfer of RSA ownership interests prior to the grant of a construction authorization. We see further that Bay Cellular openly violated 47 CFR 1.65 by failing to report significant changes in its ownership structure. Thus Bay Cellular's application has been subject to dismissal from the outset.

350. Bay Cellular is the work product of two individuals, Maurice P. O'Connell and Welton E. Firehammer. O'Connell is an investment banker, and Firehammer was a broker selling RSA applications under TCC broker, Dale Aborn (Tr.7617, 7944). O.Connell referred four of his clients to TCC (See Findings 319(1) through 319(4) *supra.*) However, O'Connell and his clients alone were not enough to form a hybrid partnership. So TCC used clients from other brokers to form a partnership (Tr.7637). Firehammer formed the partnership Tier 1 Venture Associates (Tier 1) which itself became a partner in Bay Cellular. Both Firehammer and O'Connell received considerable logistical support from Dale Aborn and TCC's Kent Maerki. In fact, the bulk of the partnership was made up of people from north Florida that Aborn had brought in (Tr.7666).

351. O'Connell recommended four of his clients, Salu Devnani, Louise Herz, Louis Powell, and Mary Jean Rainnie to TCC and received a commission for doing so (Tr.7634-7635). At the time he and his clients invested, O'Connell understood that alliances would be allowed in the RSA program, and that understanding played a part in O'Connell's decision to file for RSAs (Tr.7636, 7638, 7769-7770).

352. However, several months after filing service contract with TCC, O'Connell learned that the FCC was not allowing alliances, but that TCC had come up with the partnership concept (Tr.7636). So Bay Cellular of Florida was formed as of May 24, 1988. Aborn asked O'Connell to take the manager's job and helped him get elected (Tr.7669-7770). O'Connell was designated initial manager by "somewhere around 75 percent of the partners which were all we could get at the time." (Tr.7669-7674). All the Bay Cellular applicants had bought their applications before the partnership concept came up (Tr.7750).

353. Even before Bay Cellular was formed, W.E. Firehammer attended John Dudeck's seminar at the Kapok Tree restaurant in Madeira Beach, Florida (See Findings 275, 304-305, and 328 *supra.*). Firehammer heard about the linkage program and received his "Green Book." In addition, at the time they became partners, Aborn described linkage to all the Bay Cellular partners (AALA/CFL Ex.208). They felt that Aborn had fully explained linkage to them (Tr.7700).

354. O'Connell liked the idea of profit-sharing, but said he wanted to see it in writing (Tr.7650). He even refused to sign any more cellular applications until he was shown a copy of the agreement (Tr.7652-7653). This resulted in a luncheon meeting between O'Connell, Aborn, and Maerki. Maerki brought a draft copy of the agreement for O'Connell to review (Tr.7652). O'Connell found provisions of the draft "very murky" and that provisions regarding the distribution of sales proceeds did not "even look like a workable solution" (Tr.7660). Maerki and Aborn assured him "that it was being worked out and when the final documents came down, it would have been resolved." When O'Connell opined "that it didn't seem like a sound business proposition or a sound way to go," Maerki responded that it "was being flushed out." Maerki convinced O'Connell that he would have a copy.

355. Shortly thereafter (in mid-to-late August 1988) O'Connell met with Aborn and Maerki, Aborn brought risk-sharing ballots to O'Connell to give to the Bay Cellular partners. (Bay Cellular Ex.2, p.2 and Attachment 2, Tr.7692). On the ballot each partner was given the chance to vote for or against linking up 10 Florida partnerships and for or against an extended link up with 23 partnerships.

356. Attached to the ballot was a note from TCC broker Dale Aborn addressed to the Bay Cellular partners. He recommended voting for both linking plans, and he gave this reason:

> ". . .by standing along (sic) the partnership has a 1 in 600 chance of winning!!!! By LINKING UP with others the partnership has improved their chances of winning OR SHARING income by 23 times. . ."
>
> PS: Please return to me by Sept. 10th. . ."

AALA/CFL Ex.208; AALA/CFL Ex.215; Tr.7691-7693). The Bay Cellular Partners voted unanimously in favor of both. This included the Tier 1 partners (AALA/CFL Ex.209; CCB Ex.146; Tr.7980-7981). The vote took place on or before September 10, 1988. (Tr/.7707-7708).

357. After Bay Cellular's partners had approved the entry of their partnership into the profit-sharing proposal, TCC's Kathy Dolezal sent an Execution page to O'Connell for his signature. However, the Agreement (Terms and Conditions) was not attached to the signature page (Bay Cellular Ex.2, p.3). O'Connell was told that the signature page had to be signed immediately because the first lotteries were to be held on September 23, 1988. When O'Connell signed the MCRSA Execution document he knew it was committing Bay Cellular to the risk-sharing

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[80] It appears that O'Connell still doesn't know how much ownership equity he has in Bay Cellular. He says it's 6.4%. But, if the record facts are accurate he owns only 6.18%, i.e., his original 3.08% plus Ms. Rainnie's 3.10% (See Tr.7667).

[81] In fact, O'Connell says that the ownership list contained in Bay Cellular's original application wasn't before him when he signed the application (Tr.7647).

[82] Moreover, it wasn't until March 26, 1990 that the Commission found out what people owned Tier One Venture Associates 8.57%.

agreement (Tr.7934). Afterward O'Connell called "probably 75%" of Bay Cellular's partners and told them he'd signed the agreement.

358. On October 1, 1988, O'Connell signed Bay Cellular's application for the Mississippi 5 (Washington) RSA. (Buckhead Ex.7; Tr.7645-7646, 7770). There he certified that the application was complete in every respect and contained all of the information requested by FCC Form 401 and the Commission's rules. At the hearing O'Connell admitted that this was not the case, that he was not signing the complete applications for Bay Cellular (Tr.7653-7654, 7776-7777).

359. On October 1, 1988, when he executed Bay Cellular's Mississippi 5 (Washington) RSA application, O'Connell also certified ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." At the time he so certified O'Connell knew that less than a month before he had committed Bay Cellular to the Mutual Contingent Risk Sharing Agreement (Tr.7770-7771).

360. After signing the agreement both O'Connell and Firehammer kept up-to-date on which linked partners won markets. And they communicated this information to their fellow partners (AALA/CFL Ex.210, pp.2-3, AALA/CFL Ex.No.214, pg.1; Tr.7694, 7705-7706, 7769, 7993-7994).

361. On October 18, 1989 Bay Cellular was selected as the tentative selectee for the Mississippi 5 (Washington) RSA (CCB Ex.311). It was about this time that the subject of disclosure of the MCRSA had surfaced. On November 7, 1989 Managing Partner Maurice Pat O'Connell sent a Memorandum to the Bay Cellular Partners. That memo reads in part:

> ". . .
>
> Recently several cellular applicants have disclosed the Contingent Mutual Risk-sharing Agreement to the FCC, and have provided the FCC with a copy. As you might recall, Bay Cellular is a signatory to this Agreement. Accordingly, we have made (or will make) similar disclosures to the FCC. The aggregate effect of all disclosures is to create the possibility that the FCC might investigate our participation in the agreement. . .
>
> . . .
>
> . . .We have initiated this move to insure the best protection available to us. This was made on the suggestion of Crystall Communications (VIA Cathy). Most of the TCC partnerships have made this change. . . ." (AALA/CFL EX.216; TR.7736).

362. On November 15, 1989, Bay Cellular filed an amendment disclosing that Bay Cellular was a party to the risk sharing agreement (AALA/CFL Ex.217; Tr.7676). Of course Algreg (Greg Neely) had already made such a disclosure and had named Bay Cellular as one of the parties to the MCRSA (See Finding 267 *supra.*)

363. O'Connell held a Bay Cellular partnership meeting at his house on December 9, 1989. One of the items they discussed at that meeting was the possibility of rescinding the MCRSA. They concluded that they would *not* rescind because it would not be a moral thing to do to walk away from those that lost in the lotteries.[83] So Bay Cellular never did rescind the risk-sharing agreement (Tr.7739, 7741-7742).

364. *Intermediate Facts.* It has already been found that Bay Cellular's application should be denied for violating 47 CFR 22.922 (intra-applicant unauthorized transfer) and 47 CFR 1.65 (failure to report). See Findings 346-349 *supra.*) But even *assuming* they had not violated those rules, their application will still be denied. They lack the basic qualifications to be a Commission licensee.

365. Bay Cellular has wilfully and deliberately entered into partial settlement agreements with other nonwireline applicants in violation of 47 CFR 22.33. They have amassed multiple ownership intrests in pending RSA applications in violation of 47 CFR 22.921. And they have indirectly transferred interests in pending RSA applications, thus violating 47 CFR 22.922.

366. Equally important, Bay Cellular has falsely certified its application for the Mississippi 5 (Washington) RSA in two significant respects. First, managing partner Maurice O'Connell on October 1, 1988, certified that application was complete in every respect and contained all of the information requested by FCC Form 401 and the Commission's rules. That certification was false, and O'Connell knew it was false when he made it. At the hearing he admitted that his certification was false.

367. Bay Cellular also falsely certified its application for Mississippi 5 (Washington) when O'Connell certified ". . .that there are no understandings other than those specified in the application which provide that someone other than the applicant shall have an indirect or direct ownership. . ." At the time he so certified O'Connell knew that less than a month before Bay Cellular had entered into the Mutual Contingent Risk Sharing Agreement, and had deliberately not reported that fact to the Commission. Such deceit must not be rewarded, nor overlooked. The Commission (and the public) has a right to expect more from its permittees and licensees. These two false certifications clearly violate 47 CFR 22.923(b)(7).

368. Bay Cellular has not shown any mitigating circumstances to justify the foregoing violations. Their feeble attempt to transfer the blame for their shortcomings is totally lacking in record support. In fact the evidence points in the opposite direction. If Bay Cellular is in trouble (and it appears that they are) it's because their managing partner, Maurice O'Connell, placed his faith and trust in TCC broker Dale Aborn, and TCC's marketing director Kent Maerki.

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[83] Obviously many of Bay Cellular's other linked partnerships didn't share Bay Cellular's moral values. See Findings 96(A-1 Cellular) 120 (Cranford Cellular), 142 (New Era), 166 (Alee), 221 (TNT), 246 (Cel-Tel), 284 (Jaybar), 310 (Pinellas), and (Florida Cellular), 334 *supra.*

369. Based on the foregoing (Findings 345-368 *supra.*) Bay Cellular's application for the Mississippi 5 (Washington) RSA is denied.

Centaur Partnership

370. Centaur Partnership is a Florida General Partnership. When they filed their initial applications they represented that they had 20 partners: (1) Joanne Goolsby; (2) Harry L. Whither; (3) Gregory Tudoran; (4) James E. Clark;[84] (5) Joseph L. Washington; (6) Patricia Richardson; (7) Nettie L. Poorman; (8) Joseph A. Arthurs; (9) Mary E. Wermuth; (10) Joseph C. Bucciero; (11) Clyde H. Walker; (12) DMTV Cellular Partnership;[85] (13) Carmel Ruhling; (14) John E. Hess; (15) Susan G. Gurganas; (16) Joel T. Alford; (17) Elizabeth Settle; (18) Rebecca Pickel; (19) Phyliss Powell; and (20) Jesse Keller.[86] (Buckhead Ex.25).

371. The progenitor of Centaur is TCC broker George Ralston.[87] He placed most of the partners in Centaur, accounting for 62.15% of the equity. TCC provided the rest of the partners with their "orphan" investors (Tr.8728, 8746-8747). Ralston first became associated with TCC in 1985. He sold MSA applications, and all of his MSA clients entered into alliances. Some of them had success with the alliance program. For example, Grady Goolsby, the husband of Centaur signing partner Joanne Goolsby won minority interests in eight MSA markets as a member of an alliance (Tr.6769-6770, 8721). In addition, two non-Ralston Centaur partners, Joseph Washington and John Dolphin enjoyed success in the MSA alliance program. (Tr.5286-5288, 5303-5307, 6555, 6669).

372. Ralston started selling RSAs at the end of the MSA program in either 1986 or 1987 (Tr.8714-8715). He initially told his RSA clients that there were going to be alliances (Tr.8725). His clients favored alliances because it was a means of cutting down on the risk. But in the Spring of 1988 Ralston learned that the FCC had decided not to permit alliances in the RSAs (Tr.8721). Upon learning this, he told TCC that if there was not going to be alliances, there had to be something to replace them (Tr.8726). TCC assured Ralston that they were going to use a business plan in place of alliances. John Dolphin learned about the business plan from Ralston.

373. Ralston visualized TCC's business plan as being a two-step process. The first step was to carry out the risk-sharing concept. To this end he helped organize Centaur Partnership in July, 1988. He selected Joanne Goolsby as Centaur's signing partner (Tr.8741).

374. On the second step Ralston sponsored a number of seminars in Florida where risk-sharing was explained and discussed (Tr.8733). In addition, Ralston organized the August 23, 1988 Rockledge, Florida seminar. (See Findings 62-68 *supra.*). There William Franklin spoke about risk-sharing. Not only did Ralston attend this seminar, John Dolphin and Grady Goolsby attended (Tr.5336, 6792, 8731, 8734). At the Rockledge meeting Ralston made the offer that if anyone wasn't comfortable with the risk-sharing concept, and would talk to Ralston about it, he (Ralston) would find a way to get the dissatisfied person out of it. No one took Ralston up on his offer (Tr.8334).

375. Centaur partner, Joseph Washington owns a 9.23 ownership interest in Centaur (Buckhead Ex.25, p.4). He purchased his RSA investments through TCC broker Edward Massey. Massey sent Washington a copy of a letter he (Massey) had received from Greg Neely on May 12, 1988. That letter described TCC's business plan in detail. It also contained selective sales representations. For example, Neely wrote Massey in part, as follows (AALA/CFL Ex.193):

> ". . .
>
> Since we all believe that there are great financial rewards waiting for those in an ownership position the only question is how do we assure ourselves of winning?
>
> To help stack the odds in our favor we have come up with a two tier program. . .
>
> . . ."

The letter also specifically states that there will be a contract signed by each partnership to honor this agreement (AALA/CFL Ex.193, P.3). George Ralston also called Washington and explained the linkage program to him (Tr.6563).

376. By September 1988, Ralston had received a copy of the risk-sharing agreement; i.e., the August 26, 1988 version (Tr.8749, 8752-8753; CCB Ex.23). He made the copy available to anyone who wanted to come by his office to read it. Various Centaur partners or their relatives came by Ralston's office and read it: Carmel Ruhling (Para.370(15) *supra.*), Grady Goolsby, Joanne Goolsby's husband (Para.370(1) *supra.*), Janet Keller, Jesse Keller's wife (Para. 370(20) *supra.*), and John Settle, Elizabeth Settle's father (Para.370(17) *supra.*) were among those who went to Ralston's office and read the MCRSA (Tr.8758,8811).

377. John Dolphin attended Allan Kane's Coachman's Inn seminar in Cranford, N.J. on September 8, 1988 (See Findings 62, 84, 86-87 *supra.*). He asked William Franklin for a copy of the Agreement, and Franklin allowed John Dolphin to read it. Franklin had the August 26, 1988 version of MCRSA at the New Jersey seminar (Tr.2509-2510, 3089, 5357).

378. Sometime after August 28, 1988, but before September 23, 1988, Ralston mailed a "News Letter" to the members of the three partnerships he had formed (AALA/CFL Ex.191;[88] (Tr.8762-8763). There he indicated that if "for some reason [a partner may] wish to cast a negative vote "against the business plan, then that partner should call

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[84] James Clark is the husband of Becky Jo Clark of Alee. See Findings 151(3), 155, 159, 186, and Footnote 53 *supra.* She testified in this proceeding. Put in its most charitable light her testimony was less than persuasive. James Clark purportedly owns a 10.15% equity interest in Centaur Partnership.

[85] DMTV Cellular holds a 4.62% ownership interest in Centaur. DMTV, in turn, has five 20% general partners: (1) John P. Dolphin; (2) Carmen V. Maloney; (3) Agnes R. Trayner; (4) Julio A. Vega; and (5) J. Robert Brubaker. (Buckhead Ex.25, p.6).

[86] Joanne Goolsby, Joseph L. Washington, and John P. Dolphin of DMTV all testified in this proceeding.

[87] Ralston is a partner in a losing RSA applicant which was a party to the Risk Sharing Agreement (Tr.8720).

[88] George Ralston formed three RSA partnerships: Centaur Partnership, Cellular Concepts, and Serendipity (CCB EX.2, iii). Neither Cellular Concepts nor Serendipity won a lottery.

him. He also asked any partners who had any objections to the plan to call him (AALA/CFL Ex.191, pp.1-2). No one called Ralston to say they wanted out of the risk-sharing agreement (Tr.8765, 8767).

379. At this time John Dolphin understood that Centaur would be entering into the risk-sharing agreement. He took no action to prevent that from occurring (Tr.5370). Joseph Washington also received Ralston's letter (See Finding 378 *supra.*). He never called Ralston to object to the TCC business plan (See 6594, 6599).

380. Since he received no negative comments from the Centaur partners or from the partners of his other partnerships, Ralston proceeded to obtain the signatures of the signing partners to the MCRSA (Tr.8767). Centaur's signing partner, Joanne Goolsby came to Ralston's office to sign the MCRSA (Tr.8825). Ralston showed her the contract, explained it to her, and reminded her that her husband had explained it to her (Tr.8775-8776; Finding 376 *supra.*). Joanne Goolsby signed the MCRSA, and Gigi E. Parkerson (Ralston's secretary) witnessed Mrs. Goolsby's signature (CCB Ex.2, CCB Ex.25; Tr.6856-6857, 8824). This occurred before the first lottery was held on September 23, 1988.

381. On October 1, 1988, Joanne Goolsby signed Centaur's applications including the South Carolina 7 (Calhoun) RSA application. There she certified that those applications were ". . .complete in every respect and contains all of the information required by FCC Form 301 and the Commission's cellular application rules." (Buckhead Ex.25, p.1.).

382. That certification proved to be abjectly false. When Joanne Goolsby so certified she didn't have before the exhibit listing the Centaur partners (Buckhead Ex.25, pp.4-5), and had no idea who the Centaur partners were (Tr.6880-6881). So when she certified that Centaur was "a domestic partnership comprised of United States citizens who do not have a prohibited ownership interest many other cellular applications, permit or license for this RSA," she didn't have the foggiest notion whether that was truthful or not (Buckhead Ex.25, p.4).

383. When Joanne Goolsby certified, she did not have the page of the Centaur partnership that breaks down the DMTV partnership (See Footnote 85 *supra.*). In fact she wasn't aware of the DMTV partnership's make-up until October 23, 1991 (the day she testified), three years after she certified. When Mrs. Goolsby certified she was not aware of what type of financial commitment the partnership had secured, and she can't recall seeing the engineering sections (Tr.6795-6796, 6881).

384. Moreover, as it turns out, the original ownership list that Centaur filed with the Commission was inaccurate. See Finding 370 *supra.* Centaur has 21 partners, not 20. The original application lists General Partner Jesse Keller as having a 9.83% ownership interest in the applicant. That is inaccurate. Jesse Keller only owns a 6.75% interest. A Mrs. Janet Fapore, who is not listed in the application, owns a 3.08%. Evidently, at some point in time, Jesse Keller sold or gave Janet Fapore part of his equity interest. But it was never reported. And the Centaur partners (except for Jesse Keller) apparently never realized their ownership mistake until December 1, 1989 when they held a partnership meeting, and Janet Fapore showed up (AALA/CFL Ex.399; Buckhead Ex.25, pp.406; Centaur 6; Tr.6877-6878). Moreover, they never reported their ownership change to the Commission until April 30, 1990 (Centaur Ex.6).

385. Thus, like Bay Cellular (Findings 345-349 *supra.*), Centaur was, *ab initio*, guilty of two rules infractions. They violated 47 CFR 22.922 which prohibits the transfer of RSA ownership interests before a construction authorization is granted; and they openly violated 47 CFR 1.65 by failing to report the changes in their ownership structure.

386. When Joanne Goolsby certified Centaur's South Carolina 7 (Calhoun) RSA application on October 1, 1988, she also certified ". . .that there are no understandings other than the applicant shall have an indirect or direct ownership interest. . ." Mrs. Goolsby knew at the time she so certified that less than two weeks before (Finding 380 *supra.*), she had committed Centaur to the East Coast MCRSA.

387. After the MCRSA was signed, George Ralston kept a map in his office on which he would highlight markets which the linked partners had won. His clients would occasionally come by and check the map (Tr.8811-8812).

388. On October 4, 1989, Centaur won a lottery and became the tentative selectee for the South Carolina 7 (Calhoun) RSA (CCB Ex.311). In an amendment signed by Joanne Goolsby on October 28, 1989 and filed on November 6, 1989, Centaur disclosed to the FCC that it was a party to a multilateral agreement, and enclosed a copy of the MCRSA's "Terms and Conditions." (AALA/CFL Ex.240; Tr.6827-6828). Note that Centaur didn't disclose that it was a party to the Risk-Sharing Agreement until after Algreg (Greg Neely) had already done so, and disclosed that Centaur was also a party to the MCRSA (Finding 267 *supra.*).

389. Centaur held its first partnership meeting on December 1, 1989 (Tr.5370, 6568). There was a general understanding among the partners that Centaur was a party to the risk-sharing agreement. However, during the meeting John Dolphin and Jesse Keller took the position that Centaur had entered into an illegal scheme (Tr.6823, 6862-6863).

390. In February 1990 the Centaur Partnership met again. Centaur's attorney, Neal Goldberg of Hopkins and Sutter, attended that meeting. Again the Risk Sharing Agreement was discussed. The partners, upon advice of counsel, voted to rescind the Risk Sharing Agreement "because it was getting us in trouble" (Tr.6825). About 70% of the partnership equity was represented at the meeting, rescission consent forms were passed out and signed, the Centaur partners signed them, and Goldberg took them with him (AALA/CFL Ex.192; Tr.5378, 6825-6826, 6840-6842). The face of the rescission form acknowledges that Centaur is a signatory to the MCRSA.

391. *Intermediate Facts.* Centaur Partnership lacks the basic qualifications to become a Commission licensee. They started out by filing 428 false applications with the Commission; i.e., they falsely represented that they had 20 partners, when they had 21; they represented that Centaur partner, Jesse Keller, held a 9.83% partnership interest. He didn't. He held only a 6.75% interest. So there was a intra-partnership violation of 47 CFR 22.922 *ab initio*. Moreover, they never notified the Commission about their inaccurate ownership structure until April 30, 1990. The failure to report this defective application for some 18 months; October 1, 1988 to April 30, 1990 is an egregious violation of 47 CFR 1.65, and standing alone would also warrant denial of their application.

392. So even before we look at the facts underlying the MCRSA, the preliminary conclusion is warranted that Centaur is not fit to be a Commission licensee.

393. Next the record supports the preliminary conclusion that Centaur has wilfully and deliberately entered into partial settlement agreements with other non-wireline applicants, thus violating 47 CFR 22.33; they have amassed multiple ownership interests thus violating 47 CFR 22.921; and they have indirectly transferred interests in pending RSA applications thus violating 47 CFR 22.922.

394. Equally important, Centaur has falsely certified its application for the South Carolina 7 (Calhoun) RSA in several respects. When Joanne Goolsby certified that South Carolina 7 RSA was complete in every respect, she had absolutely no basis for so certifying and she knew it. She didn't know how many partners Centaur had or who they were. She wasn't aware that one of her partners was the DMTV Partnership, let alone who they were. She didn't even have Centaur's engineering before her. This flagrant violation of the false certification provisions of 47 CFR 22.923(b)(7) should not be countenanced and forms a separate ground for denying Centaur's South Carolina 7 RSA application.

395. Centaur has falsely certified its South Carolina 7 RSA application in another respect. On October 1, 1988, when she certified Centaur's South Carolina 7 RSA application, she represented ". . .that certification was not only false, Joanne Goolsby knew or should have know it was false. Less than two weeks before the (as signing partner had committed Centaur to the MCRSA. This is another violation of 47 CFR 22.923(b)(7).

396. Next Centaur has violated 47 CFR 1.65 in another respect (See Finding 391 *supra.*). Centaur became a participant in the MCRSA in September 1988, but deliberately withheld notifying the Commission of the MCRSA's existence until November 6, 1989. This egregious and serious 47 CFR 1.65 violation forms still another independent reason for denying Centaur's South Carolina 7 (Calhoun) RSA application.

397. Centaur's mitigation pleas are not only baseless, but in certain instances they were downright false. For instance, Joanne Goolsby submitted a predesignation Declaration under penalty of perjury to the Commission on March 23, 1990. There she stated in part:

> ". . .I had no previous experience regarding the FCC's rules and I relied on Mr. Franklin's advice in deciding to approve my partnership's entry into the Risk Sharing Agreement."

398. At the hearing it developed that Mrs. Goolsby never heard Franklin speak (Tr.6813-6814), and she relied on John Dolphin's advice, not Franklin's (Tr.6838-6839). Moreover, the record fully supports the finding that if the Centaur partnership is in trouble (and it appears that they are), they are in trouble because of the machinations of TCC broker, George Ralston. It is Ralston and TCC that took their investment dollars. It is Ralston and/or TCC they must look to if they want their money back, not William Franklin.

399. Joanne Goolsby also offers the cookie-cutter argument that she did not read the MCRSA before signing it. That argument is inane. The agreement was available in Ralston's office had she wanted to read it. Her husband did read it. She never made any effort to get a copy of the agreement. So it's her own fault that she never read the MCRSA (Tr.6822-6823).

400. Throughout this lengthy hearing we were plagued with cookie-cutter contentions. For example Centaur partner, Joseph Washington, *claims to have written* the following sentence in his direct testimony (Centaur Ex.2, p.1):

> "We decided to apply because of the long-term potential involved in operating a cellular system..."[89]

The near exact language can be found in various Declarations and direct case exhibits: Centaur Ex.4, p.1 (Dolphin's direct testimony); EJM Ex.1, p.1 (Massey's direct testimony); AALA/CFL Ex.147, p.4 (a Stan Malecki declaration); AALA/CFL Ex.164, p.2 (a Robert Bernstein declaration); AALA/CFL Ex.171, p.2 (an Anthony Cotone, Sr. declaration); AALA/CFL Ex.174, p.1 (a Renee Malanga-Wise declaration); AALA/CFL Ex.218, p.2 (a Maurice O'Connell declaration); AALA/CFL Ex.223 (a Dale Dudeck declaration); AALA/CFL Ex.239, p.2 (a Thomas Crossfield declaration); AALA/CFL Ex.241, p.2 (a Joanne Goolsby declaration); and AALA/CFL Ex.263, p.2 (a Robert Baker of Pinellas declaration).[90]

401. None of the declarants including Joseph Washington was able to convince the Trial Judge that they *wrote* that language. Nor were they able to persuade the Trial Judge that the statement truly reflected their intentions at the time they entered into the Mutual Contingent Risk Sharing Agreement.

402. Based on the foregoing (Findings 370-401 *supra.*) Centaur application for the South Carolina 7 (Calhoun) RSA is denied.

EJM Cellular Partners

403. EJM Cellular is a Texas general partnership made up of twenty partners: (1) Massey Communications;[91] (2) Ida Washington; (3) James Washington; (4) W.L. Communications;,[92] (5) Ida Ward; (6) Gary Stephenson; (7) R.W.

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[89] The obvious implication behind this sentence is that the writer wants to convince the reader that he was not buying a lottery ticket, but was seriously interested in constructing and operating an RSA cellular system no matter where and no matter when.

[90] Common Carrier Bureau Counsel accurately describes Joanne Goolsby's testimony this way: ". . .her direct case exhibit is part of a mass production of direct case exhibits by Centaur's counsel which in some cases resulted in identical exhibits (see e.g. Tr.5267-5269)." See CCB PF 493. What is depressing is the number of witnesses who claimed to have authored those identical exhibits.

[91] Massey Communications is owned 50% by Edward J. Massey of Dallas, Texas, and 50% by Billie J. Massey of Hot Springs Village, AZ.

[92] W.L. Communications is owned 30% by Jesse David Ware (Tr.6250-6251).

Smith Partners;[93] Chris Robbins; (9) John Potts; (10) Earline Perry; (11) Richard Opdyke; (12) B and A Communications;[94] (13) Ken Mazurek; (14) Tim Mayfield; (15) Gibney Kendrick; (16) Garland Fairbairn; (17) Jack English; Zane Box; (19) William Bowman; and (20) Curtis Bowman (Buckhead Ex.23, pp.5-10).

404. Edward J. Massey, the TCC representative for the Dallas, Texas area, organized EJM. Massey has been an investment advisor for the past 15 years. He invests money for his clients, and acts as an accountant and tax consultant (EJM Ex.2, Attachment 1; Tr.6113, 6223-6223, 6277).

405. Massey became a TCC representative after responding to a direct mailing from that company (Tr.6127-6128). This was at the time the MSA allocation program was in full swing. After reviewing TCC's material Massey made two decisions. First, he decided to invest in MSA applications himself. Secondly, he decided to recommend the MSA investment to his clients on a commission basis. (Tr.6128). To this end he contacted TCC and asked to be made a commissioned representative in the Dallas area. TCC made him a commissioned representative.

406. Some of Massey's clients were successful in MSA alliance (Tr.6138). But perhaps the luckiest of the investors was Massey himself. Although a member of an alliance, Massey won the MSA lottery for Bremerton, Washington (Tr.6139). He sold his winning interest to McCaw for $600,000 "as soon as I could legally sell it." (Tr.6145).

407. When the MSA allocation program came to an end, Massey began selling RSA applications. The investors who eventually became EJM partners initially purchased applications from TCC. Massey provided them with separate cellular service agreements, they signed them, and gave their executed agreements along with their checks for their TCC applications to Massey. Massey, in turn, forwarded the checks and signed cellular agreements to TCC (Tr.6126, 6222-6223). Most, if not all, of the investors who became EJM partners purchased their cellular applications from TCC before the Commission had issued its final RSA rules prohibiting alliances.

408. Then came the time when the FCC disallowed RSA alliances (Finding 39 *supra.*; Alpha Ex.12). TCC then started marketing a business plan to appease clients expecting alliances. And on May 12, 1988, TCC President Greg Neely sent Edward Massey a letter setting forth TCC's business plan in full (Tr.6158). Neely intended that the May 12th letter would take the place of the seminar (AALA/CFL Ex.193; Tr.6154). Massey, in turn, sent the letter and its attachments to his clients (Tr.6154; also see Finding 375 *supra.*).

409. In his May 12, 1988 letter Neely describes his two-step business plan to Massey (AALA/CFL Ex.193, pp.2-3; Findings 373-374 *supra.*). As for Step 1 although Massey formed EJM sometime after May 12, 1988, Massey backdated EJM's General Partnership Agreement to May 1, 1988 (EJM Ex.2, Attach.2; Tr.6125).

410. Regarding the second step of the business plan; i.e., carrying out the risk sharing concept, Massey spoke to William Franklin and Greg Neely several times about the linked partnership plan (Tr.6163-6164; 6256). He recognized that linkage would result in a winning partnership retaining 50 percent of any distributed profits and the remaining 50 percent would be split amongst the linked partnerships. Massey considered this to be very similar to alliances (Tr.6155). Massey told his partners about the risk-sharing plan. No EJM partner ever asked to see a copy of the linkage agreement (Tr.6174, 6181-6182).

411. On July 26, 1988, signing partner Edward Massey certified EJM's application for the Wyoming 4 (Niobrara) RSA. There Massey represented ". . .that their are no agreements or understandings other than those specified in the application, which provide that someone other than the applicant shall have an indirect ownership interest. . ." The Niobrara RSA application was filed with the FCC on August 5, 1988. At the time Massey certified the Wyoming 4 applications he was fully aware that TCC intended to implement a risk-sharing agreement (Buckhead Ex.311, p.1.)

412. On September 7, 1988, Massey signed and certified EJM's application for the Oklahoma 1 (Cimarron) RSA. That application was filed with the FCC on October 27, 1988 (Buckhead Ex.23, p.1). In mid-September 1988, after he had certified the Cimarron RSA application, but before that application was filed, Neely sent Massey the Execution (signature) page of the Mutual Contingent Risk Sharing Agreement (MCRSA) for signature. Massey signed the signature page as participant number 7 on behalf of the EJM partnership (CCB Ex.2; Tr.6160-6161). At the time he signed Massey was aware he was making EJM a party to the risk-sharing agreement (Tr.6167-6169). He then forwarded the page to one of the other people on the page for their signature (Tr.6167).[95]

413. On December 8, 1988, EJM won the Wyoming 4 lottery, and became the tentative selectee for that market. Massey wrote to the EJM partners informing them of the lottery win. He also told them that because of the ". . . profit-sharing program EJM Cellular has also won an interest in two additional markets." (AALA/CFL Ex.194; Tr.6174-6175).

414. Massey continually kept his EJM partners informed of the markets won by the other MCRSA signatories. On June 27, 1989, he sent them a letter telling them that EJM had "won a minority interest in five (5) additional markets." (AALA/CFL Ex.195; Tr.6174, 6176, 6179; AALA/CFL Ex.198, AALA/CFL Ex.200; Tr.6192-6193).

415. On August 9, 1989, EJM won the Oklahoma 1 lottery, and became the tentative selectee for that market.

416. In October, 1989, William Franklin contacted Massey. He told Massey that Greg Neely (Algreg) had disclosed the existence of the Risk-Sharing Agreement to the FCC, and advised Massey to also disclose (Tr.6203; Finding 267 *supra).* EJM disclosed. On October 27, 1989, Massey signed two amendments (one for Wyoming 4, and one for Okla-

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[93] R.W. Smith partners is owned 38.8% by Randall W. Smith; 50% by Douglas R. Jordan; 5.6% by Mike Fortner; and 5.6% by Terry Chrisomberry.

[94] Band A Communications is owned 50% by Byron C. Odell, and 50% by Aden Luckett.

[95] Massey says "the linked partnership, the profit sharing, and the risk sharing are all the same animal" (Tr.6234-6235). The EJM partners were at all times aware that "EJM was formed with the understanding and assistance from the Cellular Corporation to organize a Risk-Sharing Agreement between several other partnerships filing in the same markets." (AALA/CFL Ex.193, AALA/CFL Ex.202; Tr.6209, 6240).

homa, 1). There EJM represented to the FCC that it was a party to a "multi-lateral agreement" (AALA/CFL 199, p.1; Tr.6228, 6230).

417. On November 9, 1989, Massey wrote to his partners. He reported that the agreement had been disclosed. He again reiterated that EJM had a profit sharing agreement and listed the signatories to the MCRSA (AALA/CFL Ex.200; Tr.6192-6193). He also told his partners that the amount or profits they would give up from Wyoming 4 and Oklahoma 1 risk sharing was greater than they would be getting back from their linked partners' wins.

418. On January 12, 1990, Massey again wrote his EJM partners. This time he included a ballot on which the partners could vote to rescind the MCRSA. He told them that if they rescinded EJM, would own 100 percent of Wyoming 4 and Oklahoma 1." (AALA/CFL Ex.202, p.2; Tr.6209-6210), and that "EJM Cellular would [then] be ahead of the game if the FCC ruled against the profit-sharing arrangement." (AALA/CFL Ex.200). All of the EJM partners voted to rescind (AALA/CFL Ex.201; Tr.6210, 6212-6213). Massey says that EJM only rescinded the Risk Sharing Agreement because of the problems it was causing, hoping that the rescission would make ". . .all the problems and. . .the opposition go away." (Tr.6240-6241).

419. *Intermediate Facts.* EJM's applications for the Wyoming 4 (Niobrara) RSA and the Oklahoma 1 (Cimarron) RSA will be denied. They lack the basic qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other nonwireline RSA applicants in violation of 47 CFR 22.33. They have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921. And they have indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

420. Equally important, EJM has deliberately and wilfully violated 47 CFR 1.65. In Mid-September, 1988 they entered into a decisionally significant Mutual Contingent Risk Sharing Agreement (MCRSA). Yet they didn't report the existence of that agreement until October 27, 1989, over a year later. This sort of deceit is not the type of conduct befitting a Commission licensee. EJM's wilful violation of 47 CFR 1.65 forms a separate and independent reason for denying EJM's RSA applications.

421. Moreover, EJM's applications cannot be granted since EJM violates the alien ownership provisions of 47 USC 310(b). See Footnote 91 *supra.*; *Wilner and Scheiner,* 103 FCC 2d 511 (1985) *reconsidered in part,* 1 FCC Rcd 12 (1986); and *Continental Cellular,* 6 FCC Rcd 6834 (1991).

422. EJM argues that the alien in question, Long B. Vu, is a limited partner (passive investor) in a limited partnership, W.L. Communications. That argument is rejected. It is not supported by the record. No limited partnership agreement has been presented. In any event, EJM hasn't demonstrated that Long B. Vu is sufficiently insulated so as to comply with 47 USC 310(b)(3). See *Cellwave Telephone Services,* L.P. et.al., FCC 92-406 released September 11, 1992. This alien ownership violation constitutes still another reason for denying EJM's application.

423. Finally EJM has not demonstrated any mitigating circumstances worth analyzing. Certainly they (like the others *supra.*) cannot transfer their transgressions to attorney William Franklin. The record overwhelmingly demonstrates that the EJM partnership relied on and placed their faith in TCC representative, Edward J. Massey. If anyone other than themselves is responsible for the quagmire they're in, it is he.

Data Cellular Systems

424. Data Cellular, a California General Partnership is made up of 7 partners with the following equity percentages: (1) Robert Baker - 30%; (2) Karina Black - 10%; (3) Scott Bryant - 20%; (4) Susan Cade - 15%; (5) Mayford Chin - 5%; (6) Rita Jane Rowland - 10%; and (7) Jack Thompson - 10% (Buckhead Attachment 2; Tr.9935-9937).

425. The organizer and manager of Data Cellular was TCC's West Coast broker, Tye St.James. St.James put together six partnerships, four of which are involved in this proceeding.[96]

426. St.James sold MSAs for TCC under the alliance concept. He began selling RSAs in 1987, and at that time he didn't know that the FCC might prohibit alliances. But in that year he heard Nichalas Wilson speak about a business plan that TCC would implement if alliances were prohibited. St.James, Eric Leong and Doc Scott wanted that business plan implemented on the West Coast (Tr.1817, 9439-9440, 9454-9457).

427. Many of St.James' clients had experience in the MSAs and had participated in alliances. For example, Robert Baker (Para. 424(1) *supra.*) had been successful in MSA alliances (Tr.9459, 9828). So St.James sold his RSA applications under a business plan concept (Tr.9452). Then, on March 29, 1988, he received TCC President Greg Neely's letter regarding a partnership format. He contacted Neely in April 1988 and requested and received risk sharing information (See Findings 34-37 *supra;* Tr.2075, 2323, 9460, 9483).

428. Neely not only sent St.James his April 4, 1988 letter (Finding 37 *supra.*) he sent St.James' clients, including Robert Baker, information on the linked partnership program. So they were aware that the partnership concept spread the risks. It was at this time, in the Spring of 1988, that both St.James and his clients learned that the FCC had prohibited alliances. Neely also told St.James, that Eric Leong and Doc Scott, two other TCC West Coast brokers, were interested in revenue sharing (CCB Ex.303E; Tr.9460-9462, 9602, 9833).

429. In furtherance of the TCC risk sharing concept, St.James put together his six general partnerships in June, 1988.[97] He sent a copy of the partnership agreement to all of his clients, and he had them execute a signature page and return it to him (Tr.9463-9465, 9838-9839). St.James managed the six partnerships he had put together, and he selected the signing partners. For Data Cellular he selected Robert Baker. It was St.James, using a large blackboard to balance partnership memberships and equity, who placed individual applicants into the various partnerships (Tr.9441, 9446, 9465, 9467, 9819, 9940).

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[96] In addition to Data Cellular, St.James organized and managed Satellite Cellular Systems, *infra.*; Crystall Communications *infra.*; and Signal Cellular Communications *infra.* (Tr.9475). Two other of St.James applications' failed to win lotteries and were not made parties to this case: Digital Cellular Systems and Celwave Communications Commission. However Digital Cellular and Cellwave are part of the West Coast MCRSA (See CCB Ex.1).

[97] The Data Cellular partnership was executed in counterparts on June 13, 1988 (Data Ex.1, Attach.A; Tr.9839).

430. During July 1988 St.James had telephone conference calls with all the partnerships he managed. He prepared minutes of these conferences and sent the minutes to each partner (Tr.9474, 9843).

431. TCC sent Data Cellular's signing partner, Robert Baker, signature pages and application transmittal sheets for each of Data Cellular's RSA applications. TCC specifically instructed Baker that the signature pages and transmittal documents were the only documents Baker "will be signing and returning to [TCC]." In other words, at the time Baker certified that a given RSA application was ". . .complete in every respect and contains all of the information required by FCC Form 301 and the Commission's cellular application rules," he had absolutely no idea whether that certification was true or false (CCB Ex.270, 432, Tr.9844-9845).

432. On July 7, 1988, Baker signed Data Cellular's application for the California 10 (Sierra) RSA. That application was filed on July 22, 1988. There he certified ". . .that there are no agreements or understandings other than those specified in the application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." (CCB Ex.299A; Tr.9844).

433. During the summer of 1988 Baker and St.James discussed the revenue sharing plan. St.James told Baker that the plan being developed for TCC's East Coast partnerships would be adopted by the West Coast partnerships provided that St.James found the plan to be viable and legal. In August 1988, either Greg Neely or William Franklin sent St.James 3 copies of the MCRSA (Tr.2077, 2732, 9487, 9490-9491). St.James, in turn sent Robert Baker a copy (Tr.2341, 9849). Baker read the draft agreement carefully and annotated it extensively (CCB Ex.312; Tr.9849-9855).[98] He had several conversations with St.James about the Agreement (Tr.9848). St.James felt that revenue sharing was a win-win situation (Tr.9482). You were guaranteed to win at least one market (Tr.9662). St.James told Baker that a revenue sharing would reduce the risks and prevent Baker from losing his entire investment (Tr.9849).

434. During August of 1988, St.James called each individual partner in the six partnerships he managed and discussed the contents of the MCRSA (Tr.9481, 9483). In addition all seven Data Cellular partners subsequently became familiar with the detail of the Agreement through a conference call with Tye St.James, TCC President Greg Neely, and William Franklin. This conference call took place about September 17, 1988 (Tr.9485-9486, 9703). St.James told the partners, in the partnerships he managed, that revenue sharing would increase the odds of winning. The partners agreed with the idea. St.James proved to be a real advocate for risk-sharing (Tr.4179, 9484, 9604). The Data Cellular consensus was to go ahead with the MCRSA, and the Data partners knew it would be Baker who would sign the MCRSA on their behalf (Tr.9867-9868).

435. Fully aware that the MCRSA would have to be executed before the lotteries began on September 23, 1988, St.James put together a conference call to be held on September 20, 1988. The conference call was designed to unite all the West Coast applicants behind the MCRSA. Before arranging for the call St.James sent each signing partner a copy of the MCRSA (CCB Ex.312; Tr.2340, 9490, 9849, 9851, 9854, 9501).

436. Then St.James called TCC West Coast brokers, Eric Leong, Doc Scott, and Phil Kosh. He made it clear that the participants in the conference call were to be the West Coast signing partners (Tr.2221, 9494, 9667). He asked attorney William Franklin to be in on the call (Tr.2511-2515).

437. The West Coast Conference call was held on September 20, 1988. The majority of the participants in the conference call had the MCRSA (Tr.2515, 2742, 9497, 9498). Data Cellular signing partner, Robert Baker specifically mentioned sections 8.4-8.6 (See Findings 60-61, 69-70 *supra.*; Tr.9499-9500, 9854, 9871; AALA/CFL Ex.28, p.8).

438. William Franklin told the September 20, 1988 conference call participants that there was some risk the MCRSA could cause problems at the FCC; that the agreement needn't be disclosed to the FCC; and that there was a 50% chance the MCRSA would never come to the FCC's attention since it was not going to be disclosed (AALA/CFL Ex.28, at 11; Tr.2757, 9872, 9931). Franklin also agreed to get a revised copy[99] of the contract ready and federal express it to St.James to distribute for signatures (Tr.2769).

439. CCB Ex.26 is the West Coast MCRSA. Para.11.3 states that California is the governing law. St.James received CCB Ex.20 on September 20, 1988 after the conference call (CCB 26; Tr.1779, 2521-2524, 2775, 9488-9489, 9500, 9855). He sent one copy of the final version of the MCRSA out to each of the partnerships he managed (Tr.9509).

440. St.James sent Robert Baker the execution document and the terms and conditions with the instruction to sign and return the entire thing to St.James (CCB Ex.300; AALA/CFL Ex.259, p.2; Tr.9505, 9853). Baker signed the MCRSA as Participant #9 as instructed (AALA/CFL Ex.256, pp.27-29; CCB Ex.1; Tr.9875-9879, 9933).

441. After Data Cellular executed the MCRSA, Baker and his fellow partners signed written ballots that St.James had prepared. There they confirmed their previous oral approval to participants in the Agreement (CCB Ex.169; Tr.9879-9882). The ballot states:

> "With knowledge of the risks and rewards of the Mutual Contingent Revenue Sharing Agreement for fourteen partnerships. . .I do hereby vote as follows. "

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[98] It was about this time that a couple of Baker's friends brought his attention to an article in the July 25, 1988 issue of Forbes Magazine entitled "Cellular Suckers" (CCB Ex.303G). The article referred to TCC in an unfavorable light and specifically mentioned the Federal Trade Commission's prosecution of TCC (Tr.9480, 9824, 9826, 9847-9848; Findings 21-25 *supra.*) After he received the article Baker wrote Neely and asked that TCC formally respond to the allegations raised in the article. On September 7, 1988, Neely sent Baker a letter that apparently restored Baker's confidence in TCC (Tr.9825).

[99] The participants in the West Coast conference call had agreed that the law governing the contract should be changed to California (Tr.9499-9500).

All of the Data Cellular Partners voted yes. As Baker puts it ". . .this was a ratification, I mean this was obviously a ratification." (Tr.9880).

442. On October 7, 1988, Data Cellular won the California 10 (Sierra) RSA lottery, and became the tentative selectee for that market. They received their California 10 construction permit on July 3, 1989 (Data Ex.1, p.7; CCB Ex.311).

443. In October 1989, Franklin sent Robert Baker a letter. He suggested to Baker that Data Cellular disclose the MCRSA's existence to the FCC. St.James, in turn, discussed disclosure with another West Coast TCC broker, Doc Scott, and as a result recommended to his six partnerships (including Data Cellular) that they disclose the existence of the MCRSA to the FCC. The Data Cellular Partnership voted on disclosure and agreed to disclose in order to avoid problems in future lotteries. And on December 19, 1989, Data's counsel notified the Commission that "Data Cellular Systems, a partnership, entered into a Mutual Contingent Risk Sharing Agreement." (AALA/CFL Ex.262; Tr.9583-9584, 9682, 9907-9909, 9911).

444. At about the same time, St.James recommended to his six partnerships (including Data Cellular) that they rescind the MCRSA. He discussed the matter with Baker. Data Cellular's partners voted on rescission, and on December 12, 1989, Baker signed a document that purported to rescind the Agreement "as if it had never been entered into." They informed the FCC of their recession at the same time they reported the MCRSA's existence (CCB Ex.303; Tr.9585-9586, 9911-9912, 9922).

445. *Intermediate Facts.* Data Cellular's construction permit for the California 10 (Sierra) RSA will be revoked. Data Cellular lacks the character qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other non-wireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

446. Equally important, Data Cellular has openly violated 47 CFR 1.65. When Robert Baker signed Data Cellular's California 10 (Sierra) RSA application on July 7, 1988 he certified that there were no agreements or understandings other than those specified in the application which provide that someone other than the applicant shall have an indirect or direct ownership interest. Technically Baker was accurate at that time, although he was well aware that Data Cellular was about to become a participant in a revenue sharing agreement.

447. When Data Cellular did, in fact, join the West Coast Mutual (Risk Sharing Agreement (MCRSA) a short-time later; i.e., mid-September, 1988, Data Cellular was then obliged to report that decisionally significant event under 47 CFR 1.65. They deliberately did not do so. They waited over a year, until December 19, 1989, to report the existence of the MCRSA to the FCC. Such egregious deceit and lack-of-candor does not befit Commission licensees. The 47 CFR 1.65 violation forms an independent reason for revoking Data Cellular's California 10 (Sierra) RSA construction permit.

448. Data Cellular has also falsely certified their California 10 RSA application in violation of 47 CFR 22.923(b)(7). When, on July 7, 1988, Robert Baker certified that the application was ". . .complete in every respect and contains all the information required by FCC Form 301 and the Commissions cellular application rules." he had no basis whatsoever for so certifying. He didn't have the application before him. In fact he had never seen the completed application. The only materials Baker had available at that time were the signature pages of the application and the transmittal documents.

449. Data Cellular hasn't submitted any persuasive mitigating factors. In fact the record demonstrates just the opposite; i.e., that this isn't the type of applicant worthy of leniency. Data Cellular has openly and flagrantly abuse the Commission's adjudicatory processes by violating the *Ex Parte* rules.[100]

450. On July 20, 1991 (after this case had been designated for hearing) Data partner, Jack Thompson (See Para.424(7) *supra.*) solicited the assistance of 28 members of Congress to resolve this proceeding in Data's favor. He open solicited Congressional intervention in this adjudicatory proceeding. This is not the type of applicant or licensee we need in the cellular business.

Satellite Cellular Systems

451. Satellite Cellular, a California General Partnership is made up of 9 partners with the following equity interests: (1) Elsa Borcherding - 5%; (2) Sam Cade - 15%; (3) Bob Campbell - 10%; (4) Lloyd Dawson - 5%; (5) John Heerema - 22%; (6) Ken Krug - 3%; (7) George Ryan - 25%; (8) Gene Sloan - 5%; and (9) Betty Thompson - 10%.[101]

452. The organizer and initial manager of Satellite Cellular Systems was TCC West Coast broker Tye St.James. It was one of six partnerships that St.James formed and shepherded through the RSA lottery process.[102] In the Spring of 1986, St.James solicited, *inter alia*, Betty Thompson and her husband Jack to invest in cellular applications.[103]

453. St.James told the Thompsons that TCC had developed a partnership program which would enable TCC investors to minimize the risk to their RSA investment. And in April, 1988 (Finding 37 *supra.*) Betty Thompson, like other TCC RSA investors received a letter from TCC President Greg Neely fully describing that partnership program. (Data Ex.1; CCB Ex. 303; Tr.8912-8914). In June 1988 Betty Thompson purchased a 10% partnership in Satellite Cellular from St.James with a check drawn on the joint checking account she shares with her husband. (Tr.8860).

454. St.James then sent Mrs. Thompson a form partnership agreement which she executed on June 23, 1988 (Satellite Ex.1.p.2 and Attachment A; Tr.8916). St.James next set up a Satellite partnership meeting via a conference call on July 7, 1988. There Satellite designated Betty Thompson

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[100] See 47 CFR 1.1210.

[101] Betty Thompson is Jack Thompson's wife. See Findings 424(7) and 450 *supra.*

[102] Therefore many of the findings for the preceding applicant Data Cellular apply to Satellite (See Findings 424-444 *supra.*)

[103] Jack Thompson participated, with some success, in the TCC generated MSA alliance program.

as the managing general (signing) partner and St.James as the partnership manager (Data Ex.1, p.3; CCB EX.271; Tr.8920).

455. As managing general partner, Mrs. Thompson signed the application forms and transmittal sheets for all of Satellite's 250 RSA markets. More specifically, she signed and certified Satellite.s application for the Arizona 1 (Mohave) RSA (CCB Ex.270A; Data Ex.1, p.3; Tr.8925, 9055-9056).

456. TCC sent Betty Thompson only the signature pages and the application transmittal sheets for each of Satellite's 250 applications. In so doing TCC specifically instructed Mrs. Thompson that the signature pages and transmittal documents were the only documents she "will be signing and returning to [TCC]." In other words, when Mrs. Thompson certified that Satellite's application for the Arizona 1 (Mohave) was ". . .complete in every respect and curtains all of the information required by FCC Form 301 and the Commission's cellular application rules" she had absolutely no idea whether that certification was true or false. (CCB Ex.270).

457. But when she was questioned on this point at the hearing Betty Thompson swore that she had complete copies of the applications in front of her consisting of a "fairly good sized stack" complete with engineering exhibits (Tr.9055). This assertion is rejected. It not only conflicts with TCC's written instructions, it conflicts with the testimony of both Tye St.James and other signing partners in this case. (See e.g. Tr.8957-8961).[104]

458. When Betty Thompson certified Satellite's Arizona 1 (Mohave) RSA application on July 18, 1988 she also certified ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest."

459. Going into the summer of 1988, the Satellite Cellular partners knew that the FCC had prohibited alliances; and they favored the revenue sharing proposal because it would protect their investment (Tr.8936, 8942-8943). They had discussed the MCRSA with St.James; they realized that the FCC might not approve the TCC proposal; and they were aware that the MCRSA reduced their chances of their losing their entire investment (Tr.8933, 8935, 8939, 9013).

460. In late August or early September 1988, Betty Thompson and all the other Satellite partners participated in a telephone conference call with St.James and William Franklin. They discussed the MCRSA "in depth" (Tr.8939-8942; also compare with Finding 434 *supra.*).

461. On September 22, 1988, St.James sent Betty Thompson the Execution page of the Agreement along with a copy of the Terms and Conditions, and a set of instructions. Since St.James had already told her that the Satellite partners were in favor of the MCRSA (Tr.9028)[105] and since she knew the lotteries would start the next day, Mrs Thompson signed the MCRSA, had her signature notarized, and returned it to St.James by Federal Express (CCB Ex.1; Tr.8955-8956, 8960, 8964-8965, 8968; AALA/CFL Ex.256, p.44). There is no evidence that Thompson ever expressed dissent or concern about the validity of the Agreement at the time she executed it (Tr.9018).

462. However, during the hearing Betty Thompson suddenly switched stories. She argued that Satellite wasn't bound by the MCRSA because she, the signing partner, believed that she was only signing an "interim" agreement, an "interim" agreement that was to be perfected later (Tr.8956-8960, 9014-9020). That argument is rejected. It's not only totally inconsistent with other parts of her own testimony, it is inconsistent with the testimony of St.James and other West Coast signing partners (Tr.1484, 8903-8904, 8976, 9018-9019, 9025-9027, 9029, 9886; See also Fn.105 *supra.*).

463. On November 9, 1988, Satellite won the lottery for the Arizona 1 (Mohave) RSA and became the tentative selectee for that market (CCB Ex. 311). Satellite was granted its construction permit on August 4, 1989 (CCB Ex.313).

464. About a year later, in November 1989, St.James recommended that Satellite disclose its participation in the MCRSA to the FCC (Tr.8982-8925; Finding 443 *supra.*). On November 29, 1989, Betty Thompson signed and filed a notification letter with the FCC. There she disclosed that Satellite had ". . .entered into a multilateral agreement." (Tr.8981-8982; CCB Ex.275).

465. A short time later, on December 12, 1989, Mrs. Thompson and the other Satellite partners executed an "Agreement to Rescind Risk-Sharing Agreement." There they purported "to rescind, void and terminate the Agreement as if it had never been entered into." (CCB Ex.276; Tr.8993-8994, 8998).[106]

466. Although its authorization was under a cloud, Satellite pushed ahead with its efforts to construct and operate their Arizona 1 Cellular System. However, the record is devoid of any specific mitigating facts regarding that construction and operation. Betty Thompson (now Satellite's managing partner) was unable to provide any mitigating facts other than that the Arizona 1 RSA cellular system is operational. She doesn't know how many subscribers are on the system; she doesn't know who managed the day-to-day operations; and she has never even read Part 22 of the Rules (Tr.9001-9002; 9044-9045).

467. In addition to the regular issues (Para.6 *supra.* , L-1 through L-3), Satellite faces an abuse of process issue (Para.9, L-7 *supra.*). Under Issue L-7 we must determine whether Satellite abused the Commission's discovery processes by failing to timely comply with valid discovery requests.

468. First it should be noted that in a case of this size and scope, all the parties and counsel must direct themselves with energy to the successful completion of the discovery procedures, and to take extraordinary measures,

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[104] Having observed Betty Thompson's demeanor during the hearing the Trial Judge has concluded that she is *not* a reliable and trustworthy witness.

[105] Thompson and the other Satellite partners executed ballots affirming Satellite's participation in the Agreement (Tr.8970; CCB Ex.166). Each partner voted in favor of participation. Betty Thompson's signature on the ballot, like her signature on the Execution page of the MCRSA was notarized. Satellite's ballots, like Data Cellular's (Finding 44 *supra.*) was actually a ratification of the MCRSA.

[106] As noted Satellite disclosed the MCRSA's existence (Finding 464 *supra.*). And they have tried to rescind, void, and terminate it as if it had never been entered into (Finding 465 *supra.*). That seems to be going to a lot of trouble for an "interim" agreement they aren't bound by (Finding 462 *supra.*).

if necessary, to be certain that all counsel are well equipped to arrive at the truth. See *Discovery Procedures*, 11 FCC 2d 185(1968) at para.20. Stated another way, in a case of this magnitude, we cannot afford unreasonable refusals to comply with discovery requests, unexplained failures to respond to such requests, or any other misuse of the discovery procedures. Even eventual compliance, if it is untimely, can throw the trial schedule out-of-kilter. Satellite's discovery conduct must be viewed in this light.

469. Throughout this proceeding Satellite has either deliberately and steadfastly refused to comply with valid discovery requests made of them, or complied in such an untimely manner as to nullify the effectiveness of the request. Both Satellites' opponents and the Common Carrier Bureau made good faith efforts to secure documents that could reasonably lead to the adduction of admissible evidence. See *e.g. Motion to Compel Production Documents from Satellite Cellular Systems et.al.* filed by AALA/CFL (July 18, 1991); *Renewal of Motion to Compel Production of Documents and Request for Imposition of Sanctions* filed by Miller-Skywave on October 16, 1991; *Motion for Production of Documents* filed by Chief, CCB on August 16, 1991. Satellite simply refused to fully respond to these requests.

470. To date Satellite has only produced a small number of documents. Betty Thompson admitted at the hearing that she had produced some documents as recently as within a month before hearing (Tr.8920). She withheld minutes of a Satellite partnership meeting because she did not think it had any meaning (Tr.8944-8945). She concedes that admissible documents were likely to be in Sam Cade's possession. (Finding 451(2) *supra.*; Tr.8865). Yet she made no effort to obtain them (Tr.9000). Satellite was still furnishing documents as late as November 6, 1991 (Tr.8913; Tr.Vol.30).

471. *Intermediate Facts.* Satellite's construction permit for the Arizona 1 (Mohave) RSA will be revoked. They lack the character qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other nonwireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

472. Equally important, Satellite Cellular has openly violated 47 CFR 1.65. When Betty Thompson certified their Arizona 1 (Mohave) RSA application on July 18, 1988 she averred ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest. Technically, Mrs. Thompson was correct at the that time, although she was well aware that Satellite was about to become a participant in a revenue sharing agreement.

473. When Satellite Cellular, did in fact, join the West Coast Mutual Risk Sharing Agreement about two months later, Satellite was then obliged to report that decisionally significant event under 47 CFR 1.65. They deliberately decided not to do so. They waited until November 29, 1989 before they told the FCC that they were a member of a multi-lateral agreement. Such egregious deceit and lack-of-candor does not befit Commission licensees. The 47 CFR 1.65 failure-to-report forms an independent reason for revoking Satellite's Arizona 1 (Mohave) RSA application.[107]

474. Satellite Cellular also falsely certified their Arizona 1 (Mohave) RSA application in violation of 47 CFR 22.923(b)(7). When on July 18, 1988, Betty Thompson swore that Satellite's Mohave application was "complete in every respect and contains all of the information required by FCC Form 301 and the Commission's cellular application rules," she had no basis whatsoever for so certifying. She didn't have the application before. In fact, she had never seen the completed application. The only materials Betty Thompson had before her at that time were the application's signature pages and the transmittal documents.[108]

475. Satellite Cellular has also abused the Commission's discovery processes. From the very beginning, and throughout this proceeding Satellite has stonewalled discovery. They steadfastly refused to turn over documents that could lead to the adduction of admissible evidence. Even those documents that Satellite did produce were not produced timely. We exchanged our direct case exhibits on August 29, 1991, and held evidentiary admission sessions on September 6, 9, 12 and 13, 1991. Satellite was just getting around to exchanging its documents as late as November 6, 1991. (Tr.Vol.30).

476. In a case this size (31 parties) it is virtually impossible to assure mutual knowledge of all the relevant facts gathered by all the parties even when everyone is cooperating. When one or more of the parties in a multi-party case abuses or misuses the discovery process, obscurities abound, concealment and ambush became the order of the day, and it becomes all but impossible to arrive at the *whole* truth. Issue L-7 is decided adversely to Satellite and the preliminary conclusion is warranted that by abusing the Commission's discovery processes Satellite Cellular has proven in yet another way that it isn't fit to be a Commission licensee.

477. Satellite Cellular hasn't submitted any persuasive mitigating evidence. In fact record evidence that was developed that points to just the opposite; i.e., that this isn't the type of applicant that warrants leniency. Satellite Cellular has openly and flagrantly abused the Commission's *adjudicatory* processes by violating the *Ex. Parte* rules (47 CFR 1.1210).

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[107] From September 22, 1988 until November 29, 1989 Satellite failed to disclose. It is impossible to estimate the amount of time and money (the Commission's resources, and the taxpayer's money) that were expended processing TCC applications during this time period, processing applications that could and should have been summarily dismissed. Make no mistake about it. The failure of both the East Coast and the West Coast applicants to timely disclose has cost both the Commission and the taxpayer's heavily.

[108] In order to properly implement TCC's "business plan," each TCC applicant had to file from 250 to 428 separate applications. So the very size of the "fraud" TCC was perpetrating was gigantic. But to file such applications with deliberate fake certifications really compounds the fraud.

478. Between July 17 and 20, 1991, Betty Thompson (Satellite's Managing Partner) solicited 28 members of Congress to intervene in this proceeding to secure an outcome favorable to Satellite. She openly solicited *ex parte* presentations (Tr.1483, 1486, 8903-8906, 9886). She said in part:

> "I strongly urge you to look into the present practices of the FCC and help my partnership in our struggle to keep the license we have won and the cellular system we have built and are present[ly] operating in Mohave County, Arizona."

At the hearing (Tr.8905-8908), Mrs. Thompson conceded she was trying to influence the merits of the case and that her letter campaign was to promote a meeting between the legislature and the Commissioners to offset the hearing to get this thing resolved.

479. The record also reflects that another Satellite partner, Elsa Borcherding (Para.451(1) *supra.*) solicited *ex parte* intervention from California Representative Barbara Boxer, and Senator Daniel Inouye (CCB Ex.314).

480. These numerous *ex parte* violations are not mere technicalities. Every party to an administrative adjudicative proceeding is entitled to a decision based on an open record compiled under evidentiary and procedural safeguards. ". . .surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record eat at the very heart of our system of government - due process, fair play, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding . . ." *Rules Governing Ex. Parte Communications*, 1 FCC 2d 49 (1965) at para.3. Satellite Cellular is not the kind of licensee the Commission is looking for.

Signal Cellular Communications

481. Signal Cellular, a California General Partnership, is made up of six partners with the following equity interests: (1) James Heerema - 22%; (2) Malcolm Bryant - 20%; (3) William Chin - 5%; (4) Vickie Lambillotte - 25%; (5) Gerald King - 3%; and (6) Helen Baker - 25%.

482. The organizer and initial partnership manager of Signal was TCC West Coast broker Tye St.James. This was one of the six partnerships St.James formed (See Footnote 96 *supra.*). So some of the Data Cellular basic findings (Findings 424-444 *supra.*) and the Satellite Cellular basic findings (Findings 451-465 *supra.*) apply equally to Signal's formation and organization.

483. St.James obtained James Heerema's name off a TCC potential client list. Heerema had been an active MSA investor. He had invested in 20 MSA applications, and won minority interests in 5 of those markets through alliances. But he did not win any of them outright. Heerema hadn't purchased his MSA applications from TCC. (Tr.8367-8368). Heerema ultimately purchased his RSA investment from TCC through St.James, after discussing TCC's fees (Tr.8371-8372).

484. When the FCC said it was disallowing alliances St.James contacted Heerema and so notified him. But, said St.James, there was going to be a business plan for the RSA applicants. (Tr.8373).

485. TCC controlled Signal's formation. There was little input from the investors. Pursuant to that business plan, St.James provided the Signal investors with partnership form agreements and coordinated their execution. The partnership agreement was made and entered into as of June 22, 1988 (Signal Ex.1; Tr.8464-8465).

486. In late June or early July, 1988, Tye St.James set up a conference call for the Satellite partners.[109] St.James became partnership manager pursuant to a partnership vote and Heerema was elected to the position of signing partner during that conference call (Signal Ex.1; Tr.8375-8376, 8378, 9475).

487. In late August and early September, 1988, Tye St.James set up two more conference calls. In addition to St.James, Heerema, and the other Signal partners, and Greg Neely (TCC's President) participated in the first conference call (Tr.8380-8382, 8384, 8437). St.James and Neely described the TCC risk sharing plan in detail and how it worked. At the conclusion of the conference call an oral vote was taken, and the Signal Partnership unanimously decided to pursue the risk-sharing agreement (Signal Ex.1, p.5; Tr.8387-8388).

488. On or about September 19, 1988, Signal managing partner St.James sent Signal's signing partner Heerema a copy of TCC's Mutual Contingent Risk Sharing Agreement (MCRSA). At about the same time St.James notified Heerema, that he (Heerema) was to participate in a September 20, 1988 conference call between the signing partners for each partnership interested in joining the MCRSA (Tr.8374-8375, 8388-8389).

489. Heerema participated in the West Coast conference call (Findings 436-438 *supra.* AALA/CFL Ex.28, p.5; Tr.8389) on September 20, 1988, just three days before the first lotteries were to be held. William Franklin, TCC's attorney and the MCRSA drafter, participated in that conference call, and discussed the risks involved. Franklin indicated, *inter alia:* that the Agreement did not need to be disclosed to the Commission; that there was a 50% chance the Commission wouldn't find out about the Agreement; and that he thought that there was a 95-97% chance the Agreement would be upheld after a series of appeals. But, added Franklin, even if the Commission ". . .says the entire agreement stinks, . . .you are right back where you are now so you have lost absolutely nothing. (AALA/CFL Ex.28; Tr.8483, 8488-8489).[110]

490. Franklin concluded by saying he would federal express a copy of the MCRSA to St.James with the revisions agreed upon at the conference. He did so. St.James, in turn, sent all the signing partners the Terms and Conditions, the Execution Document, and Franklin's cover letter. Heerema received his copy of the MCRSA from

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[109] Unlike the other partnerships we've analyzed so far, Signal's partners are geographically widely dispersed. Consequently most, if not all, of the partnership's business was conducted via telephone conference calls.

[110] During this conference call Franklin also told the participant that after all the licenses had been awarded, they would collapse the linking program by forming one big corporation. This would ". . .formalize the linking process . . .by having a single ownership of all the licenses. . ." (AALA/CFL. Ex.No.28, p.19).

St.James and signed it on September 22, 1992 (CCB Ex.1; Tr.8394-8397). When he signed the signature page he knew it was for the risk-sharing agreement (Tr.8397).

491. After the MCRSA was signed, Tye St.James sent ballots to all six of his partnerships, including Signal. He asked them to put their approval of the risk-sharing agreement into writing. He included a note which read, in part: "Hi partner -- Please vote and return today." (Tr.9510; CCB Ex.286). The Signal partners voted unanimously in favor of joining the risk-sharing agreement (CCB Ex.170; Tr.8403-8404, 9510, 9514).[111]

492. St.James kept his partnerships, including Signal, informed about the upcoming lotteries which listed all of the linked partners (AALA/CFL Ex.257; Tr.8415, 9618-9619).

493. On or about October 7, 1988, the signing partner, James Heerema signed Signal's RSA applications, including Signal's South Carolina 8 (Hampton) RSA application. There he certified, among other things, ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than those specified in this application shall have an indirect or direct ownership interest." (Buckhead Ex.27). Heerema so certified about two weeks after he signed the Risk-Sharing Agreement. He read the certifications before he signed (Tr.8455-8456). Signal filed its South Carolina 8 (Hampton) RSA application on November 17, 1988 (Buckhead Ex.27).

494. On October 4, 1989, Signal won the lottery for the South Carolina 8 (Hampton) RSA and became the tentative selectee for that market (CCB Ex.311). In October 1989, St.James contacted Heerema, and recommended that Signal's role in the MCRSA be disclosed to the FCC (Tr.8422). There is also evidence that the law firm of Brown, Finn and Neitert had advised Heerema to so disclose. In fact Heerema talked with David Kaufmann of Brown, Finn before disclosing. (Signal Ex.1, pp.6-7; Tr.8422-8424, 8460-8461).

495. On October 27, 1989, James Heerema signed an amendment reporting ". . .the existence of a multilateral agreement to which the applicant is a party." (See AALA/CFL Ex.348; Tr.8425-8429). Shortly thereafter St.James recommended that Signal rescind the MCRSA. The Signal Partnership thereupon voted to rescind (Tr.8431-8434; AALA/CFL Ex.349).

496. *Intermediate Facts.* Signal's application for the South Carolina 8 (Hampton) RSA will be denied. They lack the character to be a Commission licensee. Signal has wilfully and deliberately entered into partial settlement agreements with other nonwireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending applications, thus violating 47 CFR 22.922.

497. Equally important Signal has falsely certified their South Carolina 8 (Hampton) RSA application, thus violating 47 CFR 22.923(b)(7). James Heerema, on October 7, 1988, certified ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than those specified in this application shall have an indirect or direct ownership interest." At that time he knew or must have known that certification was abjectly false. Only two weeks before, as Signal's signing partner, he had committed the partnership to the multi-lateral risk-sharing agreement. That false certification forms a further and independent reason for denying Signal's South Carolina 8 RSA application.

498. Signal has also violated 47 CFR 1.65 by failing to timely report the MCRSA's existence to the FCC. They entered into the MCRSA on September 22, 1992. But they deliberately did not disclose until over a year later (October 27, 1989), after they had won the South Carolina 8 (Hampton) RSA market. Stated another way, they deliberately let the Commission staff process some 428 otherwise dismissible RSA applications, and didn't disclose decisionally significant information until the processing had been completed and the lottery held. This calloused disregard for the Commission's resources and the taxpayer's money mandates denial of the wrongdoer's application.

499. Signal Cellular hasn't submitted any mitigating evidence worth analyzing. Certainly James Heerema's feeble attempts to transfer responsibility for the partnership's transgressions to William Franklin has no merit. If Signal's application is in trouble, and it appears that it is, the only possible culprit, other than themselves, would be TCC West Coast Broker, Tye St.James. James Heerema placed his trust in Tye St.James; and that's the name of that tune.

Crystal Communications Systems

500. Crystal Communications, a California General Partnership, is made up of 9 partners with the following equity percentages: (1) Ed Bryant - 22%; (2) Barbara Campbell - 10%; (3) Ann Dawson - 5%; (4) Ellen Kirwan - 3%; (5) C.E. McKeever - 10%; (6) Terry Pinna - 10%; (7) Margaret Price - 24%; (8) Camella Ryan - 10%; and (9) Gail Smelick.

501. The organizer and manager of Crystal was TCC West Coast broker, Tye St.James. This was one of the six partnerships St.James formed. (See Footnote 95 *supra.*). So some of the basic findings for Data Cellular, Satellite Cellular, and Signal Cellular also apply to Crystal's formation and organization (See Finding 482 *supra.*).

502. In the late Spring or early summer of 1988, Ellen Kirwan (Para.500(4) *supra.*) purchased her RSA applications from St.James (Tr.8548). She executed her Crystal Agreement of General Partnership on June 22, 1988. In early July, St.James was elected Crystal's Partnership Manager, and Ellen Kirwan became Crystal's signing General Partner (CCB Ex.B; Tr.8544).[112] As signing partner, Kirwan was responsible for legally binding the partnership, and clearly understood this was her function (Tr.8570; 8579). As Crystal's Partnership manager, St.James opened the Crystal checking account at a local Sausalito bank. And he was the only person with partnership check writing authority

[111] The Tye St.James' applications used the "ballot" process as a ratification process. (See Findings 441, and Footnote 105 *supra.*).

[112] Ms. Kirwan and St.James are close personal friends. Greg Neely described her as St.James' wife. When St.James left TCC's Sausalito office and came east to TCC's headquarters in Cleveland on assignment, Ms. Kirwan moved with him, and they resided at the same address. In the fall of 1988, Kirwan went to St.James office and helped out by making copies and doing office work. (Tr.8548, 8555, 9468).

until Terry Pinna (Para.500(6) *supra.*) replaced Ellen Kirwan as Crystal's signing partner in March or April, 1990. (Tr.8645-8646).

503. During the summer of 1988, Ms. Kirwan signed 250 Crystal RSA applications. This included their application for the Oregon 1 (Clatsop) RSA which she signed on July 29, 1988, (Crystal Ex.1; Tr.8559). There Ms. Kirwan certified ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ."

504. In August 1988, St.James explained the revenue sharing plan to Ms. Kirwan. She understood that it ". . .was an opportunity to share the risk of our investment." (Tr.8572-8574). In addition, at the end of August or early September 1988, St.James called all of the other Crystal partners and explained the sharing arrangement to each of them (Crystal Exs.1 and 2; Tr.8570; and compare with Findings 434, 459, 486 *supra.*). Whenever Kirwan had a question about the Agreement or any other partnership matter, she'd call St.James and ask him about it (Tr.8570).

505. On either September 10 or September 17, 1988, St.James set up a Crystal partnership conference call. There they discussed Crystal's entering the MCRSA; St.James explained the MCRSA to all the partners; they discussed the 50-50 sharing, and the risks that the FCC would not approve the agreement; and they also discussed not disclosing the agreement to the FCC (Tr.8586-8589, 8630, 8677). As a result of this conference call Ms. Kirwan clearly understood that she had the authority to commit the partnership to the risk sharing agreement (Tr.8591).

506. St.James then set up the September 20, 1988 conference call between all the West Coast signing partners, the West Coast TCC brokers, and William Franklin (Tr.9481-9482; compare with Findings 435-438, and 489-490 *supra.*). Ellen Kirwan participated in that call. She already had a copy of the MCRSA and had read it before the call, and she was in St.James office during the call. (AALA/CFL Ex.28; Tr.8579, 8593).

507. The West Coast Conference call lasted at least one hour (AALA/CFL Ex.28 at 28). And at its conclusion Franklin agreed to prepare a revised copy of the MCRSA and send it to St.James to distribute for signatures. He did so (AALA/CFL Ex.28, p.27; Tr.9495, 9501; and Finding 438 *supra.*).

508. St.James gave Kirwan the signature page for the MCRSA. She signed the document and had her signature notarized. She signed knowing all her partners were in agreement that she had the authority of the partnership. She was also aware that she was signing before the first lotteries were held (CCB Ex.1; Tr.8576-8577, 8582-8584, 8591-8594, 8651-8652, 8683-8684).

509. After Kirwan had executed the Agreement, and after all the Crystal partners were made aware that she had done so (Tr.8598), the Crystal partnership ratified the MCRSA by ballot (CCB Ex.167; Tr.8597; see also Finding 491 and Footnote 110 *supra.*).

510. TCC and TCC West Coast Broker kept their partnerships updated about lottery victories. For instance Ellen Kirwan recalls receiving a list of all the linked partners, a copy of which she forwarded to TCC West Coast broker, Eric Leong. She also remembers receiving bulletins about upcoming lotteries (CCB Ex.156A; CCB Ex.285; Tr.8600-8601, 9619).

511. On December 8, 1988, Crystal won the Oregon (Clatsop) RSA lottery, and became the tentative selectee for that market. (CCB Ex.311; CCB Ex.299A). Their Oregon1 RSA construction permit was granted on September 28, 1989 (CCB Ex.313).

512. During the Fall of 1989, St.James informed Kirwan that Richard Brown of Brown, Finn and Nietert had advised him to disclose the existence of the Agreement to the FCC, and that he recommended disclosure. He also discussed disclosure with each Crystal partner, and they agreed to disclose the MCRSA's existence to the FCC (CCB Ex.297A; Tr.8602, 8615-8616). In a letter dated November 13, 1989, and signed by Ellen Kirwan, Crystal admitted that it had ". . .entered into the multilateral agreement in September, 1988" (AALA/CFL EX.340; CCB Ex.297).

513. Upon the advice of Brown, Finn, and Nietert, and after partnership discussions with St.James, Kirwan executed a document on behalf of Crystal *purporting* to rescind Crystal's participation in the agreement (CCB Ex.298; Tr.8619.[113] She executed the document on December 12, 1989, and indicates that Crystal tried to ". . .rescind, void and terminate the Agreement as if it had never been entered into." (CCB 288). On December 19, 1989, David Kaufman of Brown, Finn transmitted the rescission to the Commission (AALA/CFL EX.342; Tr.8616, 8620).

514. Although the Oregon 1 (Clatsop) authorization was under a cloud, and Crystal was well aware of that fact, they pushed ahead with their efforts to construct their cellular system. However, the record is devoid of any specific mitigating facts regarding that construction and operation. Aside from Tye St.James, the only person who testified on Crystal's behalf was Ellen Kirwan. Kirwan wasn't involved in any of the negotiations for construction of the system (Tr.8625). She has never been to the site to witness the progress of construction or operations (Tr.8627-8628). And while she stated that "[t]hat the partnership initiated service on or about March 21, 1991 and continues to provide service. . .," she didn't know what the subscriber and roamer figures for the Oregon 1 RSA were.

515. In fact Ellen Kirwan displayed a seemingly chronic inability to recall details of her management responsibilities, an inability that belies any claim of intimate involvement with the workings of the Crystal partnership. Some examples will suffice. At Tr.8555-8557, she had only a vague recollection of seeing minutes of the partnership teleconference where she was elected signing partner; she had no recollection of who prepared partnership meeting minutes; and she could not recall any discussion of a business plan or revenue sharing during the July 1988 conference call.

516. At. Tr.8560 she was unable to recall receiving instructions from TCC about executing applications and

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[113] The word "purporting" is appropriate. *All* the participants (the signing partners) signed both the East Coast and West Coast MCRSAs. Now you have *one* of the signatories to a multilateral agreement unilaterally trying to rescind it.

transmittals.[114] At Tr.8588-8593 she couldn't recall whether she asked questions during the September 10 or 17, 1988 conference call or whether Greg Neely was present on such call.

517. At Tr.8592 she couldn't recall who in Crystal negotiated with William Franklin to represent Crystal, or who ultimately fired him.

518. When the faulty memory of the *only* Crystal general partner to testify is combined with Crystal's abuse of the Commission's discovery processes *infra.* it will indeed be fortunate if we've gathered the *whole* truth on the issues facing that applicant.

519. In addition to the regular issues designated against it (Para.6 *supra.*, Issues L-1 through L-3), Crystal faces an abuse of process issue (Para.9, L-7 *supra.*). Under Issue L-7 we must determine whether Crystal abused the Commission's discovery processes by failing to timely comply with valid discovery requests.

520. Throughout this proceeding Crystal has either deliberately and steadfastly refused to comply with valid discovery requests made of them, or complied in such an untimely manner as to nullify the effectiveness of the request. Both Crystal's opponents and the Common Carrier Bureau made good faith efforts to secure documents that could reasonably lead to the adduction of admissible evidence. See *e.g. Motion to Compel Production Documents from Crystal Communications et.al.* filed by AALA/CFL (July 18, 1991); *Renewal of Motion to Compel Production of Documents and Request for Imposition of Sanctions* filed by Chief, CCB on August 16, 1991; *Motion for Production of Documents* filed by Chief, CCB on August 16, 1991; and *Motion to Compel Production of Documents from Satellite Cellular Systems et.al.* filed by Chief CCB on September 25, 1991. Crystal simply refused to respond fully to these requests.

521. At the hearing Crystal general partner Ellen Kirwan attempted to explain why Crystal hadn't produced relevant documents. She said that in March or April 1990 when Terry Pinna took over as Crystal's signing partner (See Finding 502 *supra.*) she turned over all her documents to Pinna. But she has never asked Pinna to make any documents available to David Hill, Crystal's counsel (Tr.8561, 8564).

522. Then she further explained that a week before the hearing she found more pertinent documents in a trunk in her house. However, she didn't turn these newly discovered documents over to the Hill until the eve of the hearing (Tr.8562-8563). Her counsel told her to bring these documents with her instead of sending them (Tr.8613).

523. There were certain documents that other West Coast partnerships produced that Crystal didn't produce. For instance other partnerships produced minutes of a conference call held in September 1988. Crystal never did. Other West Coast partnerships submitted a copy of an August Bulletin; i.e., CCB Ex.156A. Crystal never did. Ellen Kirwan remembered receiving what is now CCB Ex.285 (Top of the Day). Crystal never turned it over on discovery. Various bulletins about upcoming lotteries were not produced (Tr.8601).

524. One document, what is now CCB Ex.299B, was turned over at 4:30 p.m. the day before the hearing (Tr.8611-8612). Kirwan says she never talked to Pinna about the documents she shipped to him, and she further says that she has no idea how many times Hill talked to Pinna (Tr.8668-8669). Of course, Terry Pinna didn't testify in this proceeding. Crystal didn't produce the last of their purported documents until November 5, 1991, the 29th day of hearing.

525. *Intermediate Facts.* Crystal Communications' construction permit for the Oregon 1 (Clatsop) RSA will be revoked. They lack the character qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other non-wireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

526. Equally important, Crystal has openly and flagrantly violated 47 CFR 1.65. During the summer of 1988, Crystal's signing partner Ellen Kirwan signed 428 Crystal RSA applications, including the Oregon 1 (Clatsop) application which she signed on July 29, 1988. There she certified "that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest." Technically, Ms. Kirwan was correct at that time (July 29, 1988), although she knew or should have known that Crystal was about to become a participant in a multilateral risk sharing agreement.

527. When, less than two months later, Crystal did, in fact, join the West Coast Mutual Risk Sharing Agreement, Crystal was than obliged to report that decisionally significant event under 47 CFR 1.65, obliged to report that event in 428 applications including the Oregon 1 (Clatsop) application. They deliberately didn't do so. When they won the Oregon 1 lottery on December 8, 1988, they still didn't report the existence of the MCRSA to the FCC. When their Oregon 1 RSA construction permit was granted on September 28, 1989, they still didn't disclose the Agreement's existence. It wasn't until November 13, 1989, that Crystal notified the Commission that they had ". . .entered into the multilateral agreement in September, 1988."

528. This egregious 47 CFR 1.65 violation is blatant deception and Crystal's lack-of-candor is not the type of conduct befitting a Commission licensee. So the 47 CFR 1.65 violation forms another independent reason for revoking Crystal's Oregon 1 RSA application.

529. An intermediate finding is also warranted that Crystal has abused the Commission's discovery processes. They made no attempt to successfully complete discovery (See Finding 468 *supra.*). In fact the record shows that they did just the opposite. They attempted to thwart the search for the truth. So issue L-7 is resolved adversely to Crystal and it is held that their abuse of the Commission's discovery processes renders them unfit to be a Commission licensee.

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[114] Thus the cross-examiners could not develop the same information that they developed with Robert Baker of Data Cellular (Findings 431 and 448 *supra.*) or with Betty Thompson of Satellite Cellular (Findings 456 and 474 *supra.*).

530. Finally, Crystal hasn't submitted any mitigating evidence worth considering. Ellen Kirwan's feeble attempts to transfer responsibilities for the partnership's transgressions to William Franklin fly wide of the mark. In fact they're ludicrous. Ellen Kirwan, as well as the other Crystal partners, placed her (their) trust in TCC West Coast broker, Tye St.James. If a culprit other than the partnership exists, that culprit is TCC and/or its brokers.[115]

Cellular Pacific

531. Cellular Pacific is an Hawaiian General Partnership composed of 26 partners: (1) Yui Lin Ching Lui; (2) Vincent Au; (3) Eric W.K. Auyoung; (4) Layton H.S. Chew; (5) Quon Hin Chong; (6) Frances Y.L. Dimond (7) Mary W.B. Dimond; (8) Yukio Hirayama; (9) Jan Hugo; (10) Judith T. Kagawa; (11) Dorothy K. Kokubun; (12) Malba E. Kop; (13) Garrett A. Lau; (14) Wallace T.U. Leong; (15) April F. Leong; (16) Vreneli Matsumoto; (17) Roy M. Mikami; (18) Franklin S. Muraki; (19) Alice M. Muraki; (20) Sonette M. Muramoto; (21) Gwendolyn H.J. Nakaoka; (22) Louis H. Peterson, Jr.; (23) Dayne T. Shinbo; (24) George T. Tamashiro; (25) Diana S. Tengan; and (26) Michael S. Yogi.

532. The organizer and business coordinator of Cellular Pacific is TCC's Hawaiian broker, Eric Leong. Eric Leong, a Honolulu financial planner, was extensively involved in MSA investments and placed many of his investors into alliances. Leong himself was an MSA investor, as well as his wife, Elinor. Most of Eric Leong's MSA clients were successful because of alliances (Tr.10090-10092, 10094-10099, 10118-10119, 10128-10131, 10235).

533. During the 1985-1986 period when Eric Leong sold MSA applications, his intermediary was Ralph Matsuda. Leong received a 10% commission on his sales, Matsuda received an override on Leong's sales and dealt with Kent Maerki at TCC; Maerki, in turn, received an override on Matsuda's sales (Tr.10099-10100). Leong admitted that in 1987 he learned about the consent decree that TCC, Spectra, Kent Maerki, Nichalas Wilson *et.al.* had entered into a consent decree. (Tr.10104-10106; Findings 21-24 *supra.)*. He further admitted that in 1987 he became aware that Kent Maerki had declared bankruptcy (Tr.10106-10107; Finding 23 *supra.*).

534. It was also in 1987 that Eric Leong heard that the FCC was going to prohibit alliances, but he also heard Nick Wilson say that TCC would have a business plan to take their place (Tr.10110; Finding 28 *supra.*)

535. In May or June 1988, Leong began selling RSA applications under a direct broker relationship with TCC. At some time after the Commission's final RSA rules were announced, Leong put together three partnerships: Hawaiian Pacific Cellular,[116] North American Cellular *infra.* . and this partnership, Cellular Pacific. (Tr.10104, 10120-10121, 10124-10125, 10286-10287). It was in May of 1988 that Eric Leong learned that TCC was developing a partnership program (Tr.10116).

536. Eric Leong not only created Cellular Pacific *et.al.*, he coordinated the execution of all the applications they filed, and he acts as business coordinator on an ongoing basis. And since February 1990, he has been paid $3,000 per month, per partnership, to serve as business coordinator (Tr.9758, 10143-10144, 10231).

537. Eric Leong sold Cellular Pacific partnership interests to his sister April Leong (Para.531(15) *supra.*) and his father, Wallace Leong (Para.531(14) *supra.*) He recruited his father to serve as Cellular Pacific's managing partner because he was available to perform the required administrative tasks. The partnership subsequently confirmed Wallace Leong's appointment. However, Eric Leong maintains Cellular Pacific's partnership files. He also opened Cellular Pacific's checking account; he and his father both hold check writing authority for the partnership (Tr.9750, 10006, 10011-10012, 10126, 10134-10136, 10145-10148).

538. On July 7, 1988, Wallace Leong signed the Cellular Pacific's RSA application for the California 11 (El Dorado) market. He received the transmittal sheet and Form 401 certification from his son Eric Leong, who himself received those documents from TCC. There he certified *inter alia*, that the application was ". . .complete in every respect and contains all of the information required by the FCC Form 301 and the Commission's cellular application rules." (CCB Ex.306, Tr.10012-10013, 10058, 10187).

539. He further certified ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest..." (CCB Ex.306) Cellular Pacific's California 11 RSA application was filed on July 22, 1988.

540. Wallace Leong was asked about his certifications at his deposition. He testified that only the signature pages of the application were in his possession at the time he signed.[117] But at the hearing Wallace Leong tried to change his story. He then stated he could not recall which documents he had when he signed the applications and transmittals. He further suggested that there may have been some other papers included in the documents he certified.[118] (Tr.10059-10060). Eric Leong's testimony on the point was of no help either. The most he could say "They sent me a whole bunch of papers. I know it came in boxes." (Tr.10187).

541. The foregoing (Findings 538 and 540 *supra.*) leads to the acceptance of Wallace Leong's deposition averment that only the signature pages of the application and transmittal's signature pages were before him when he signed the Cellular Pacific California 11 (El Dorado) RSA application.

542. In August/September 1988 Eric Leong got the details of the risk sharing concept. TCC West Coast broker, Tye St.James, contacted him. St.James said he got Eric's

[115] It should now be imminently clear to the reader why TCC's original owner, Nichalas Wilson, insisted that Maerki's sales force hold themselves out as *independent contractors* (See Finding 19 *supra.*), and why TCC was willing to pay Maerki a 56% commission on sales (See Finding 20 *supra.*)

[116] Hawaiian Pacific executed and was a party to the West Coast MCRSA. But they failed to *win* a lottery and thus were not made a party to this proceeding (See CCB Ex.1).

[117] This procedure accords with the way TCC processed other West Coast RSA applications. For example, see Findings 431, 448, 456, 474 *supra.*

[118] That suggestion, however, falls far short of his certification that the California 11 application was ". . .complete in every respect. . ." See Finding 538 *supra.*

name from Greg Neely (Tr.10230). St.James explained TCC's risk sharing concept in terms of the voluminous numbers of applications filed in the RSAs. Eric Leong understood that TCC's MCRSA was a substitute plan for alliances (Tr.10111, 10149-10152, 10230). After the initial telephone call from St.James in late August 1988, Eric Leong spoke with Cellular Pacific about TCC's risk sharing agreement. (Tr.10156).

543. Eric Leong had a copy of the MCRSA but doesn't remember when he got it. The copy he has is similar to the CCB Ex.26 (Tr.10151-10153). Leong remembers seeing both the Terms and Conditions and the Execution Pages (Tr.10156, 10233).

544. Eric Leong participated in the September 20, 1988 West Coast conference call (See Finding 506 and references cited there). After the conference, he called Cellular Pacific's partners and told them about the MCRSA (Tr.10166-10169), and that the "risks of losing everything was a little less" (Tr.10171). He told them that the Agreement need not be disclosed to the FCC (Tr.9773) but that there was some risk that the FCC would not approve the MCRSA (Tr.10177). No one told him not to enter the risk-sharing program (Tr.10172). In fact the partners Eric Leong talked to agreed with the program (Tr.10169).

545. Wallace Leong was traveling abroad on and around September 22, 1992. But before he left he drew up a power of attorney appointing his daughter, April Leong his attorney-in-fact (AALA/CFL Ex.256, p.11; Tr.9754-9755, 10015, 10021; Cel-Pac. Ex.2).[119] April Leong is also a Cellular Pacific general partner (Findings 537 and 531(15) *supra.*). Eric contacted April on September 22, 1992, and told her to sign the MCRSA because her father wasn't available (Tr.9757, 10178-10180).

546. Eric Leong told April that he had contacted the other Cellular Pacific partners, that they had already voted for the MCRSA, and that they had authorized her to sign the MCRSA (Tr.9792, 10178-10179). April Leong signed the MCRSA in the presence of a notary on September 22, 1988. Eric Leong than sent the executed signature pages of the MCRSA to St.James along with the power of attorney (Tr.9761-9764, 10178-10182; CCB Ex.1; AALA/CFL Ex.256).

547. When Wallace Leong returned from his trip in late September 1988 both Eric Leong and April Leong discussed revenue sharing with him. Wallace learned that the partnership had authorized April to sign the MCRSA and that Cellular Pacific was an integral part of that Agreement (Tr.9754, 10017, 10180, 10295).

548. After April Leong signed the MCRSA on Cellular Pacific's behalf, the partnership followed the St.James' ratification procedure, a procedure designed to protect the authorized signer of the Agreement (Tr.10188-10189). In early October, 1988 St.James sent Eric Leong the sample Cellular Pacific ballots; Eric Leong, in turn sent the ballots to the individual Cellular Pacific partners; and the Cellular Pacific partners executed the ballots and returned them to Eric Leong (Tr.9765-9769, 10188-10193; CCB Ex.293).

549. On October 9, 1988, Cellular Pacific won the lottery for the California 11 (El Dorado) RSA and became the tentative selectee for that market. Eric Leong was aware that there were 14 partnerships in the revenue sharing program, and he received a list of those partnerships. So when Cellular Pacific partners called he could tell them who they were linked with and he could tell them the lottery results (Tr.10018, 10022, 10140-10141, 10162-10163, 10195, 10208; CCB Ex.311). Cellular Pacific was granted its construction permit for the California 11 RSA on July 19, 1989 (CCB Ex.313).

550. During the late summer or early fall of 1989, the topic of the day among TCC generated partnerships was whether the MCRSA should be disclosed to the FCC. On October 17, 1989, Eric Leong attended the critical meeting at the Newark Airport where the wisdom of disclosure was the primary topic. (See Tr.10203-10205; Finding 266 *supra.*) A short time later, on October 26, 1989, Stan Malecki sent Leong a Memorandum. There Malecki informed him that his (Malecki's) East Coast partnerships intended to disclose the Agreement to the Commission. The following day William Franklin sent Eric Leong a letter advising the Hawaiian partnerships to disclose (Tr.10207).[120]

551. Eric Leong then told the Cellular Pacific partners that they should disclose the existence of the MCRSA to the FCC. The signing partners disclosed. In a Memorandum to the FCC signed by Wallace Leong, and dated November 1, 1989, Cellular Pacific admitted ". . .that Cellular Pacific is a signatory to a multilateral agreement. . ." (Tr.10025, 10210; CCB Ex.294).

552. In early December, 1989, St.James told Eric Leong that in addition to disclosure, the West Coast partnership should also rescind the Agreement, rescind it so that there would be no taint on any future lottery wins. Eric Leong also discussed the wisdom of such a move with Franklin. On December 12, 1989, Wallace Leong, on behalf of Cellular Pacific signed an "Agreement to Rescind Risk-Sharing Agreement." There he (Wallace) purported to "rescind, void and terminate the Agreement as if it had never been entered into. . ." (Tr.10033, 10217; CCB Ex.290).

553. Eric Leong then telecopied the executed Cellular Pacific rescission to Richard Brown of Brown, Finn, and Neitert, who, in turn, submitted it to the Commission (Tr.10029, 10213-10223; CCB Ex.290). On or about January 14, 1990 each Cellular Pacific partner executed a ballot affirming Cellular Pacific's rescission of the Agreement (CCB Ex.295; Tr.9778, 10030-10031, 10222-10225).

554. In addition to the regular issues designated against them, Cellular Pacific also faces an abuse-of-process issue (Para.9, Issue L-7 *supra.*). Under Issue L-7 we must determine whether Cellular Pacific abused the Commission's discovery processes by failing to timely comply with valid discovery requests.[121]

555. Throughout this proceeding Cellular Pacific has either deliberately and steadfastly refused to comply with valid discovery requests made of them, or complied in such an untimely manner as to nullify the effectiveness of the request. Both Cellular Pacific's opponents and the Com-

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[119] The Notary who handled the power-of-attorney matter was Katherine Leong, April and Eric Leong's aunt (Tr.10179).

[120] One must remember that Greg Neely, the owner of Algreg, disclosed the existence of the Agreement to the FCC on October 25, 1989, just seven days after the Newark airport meeting (Finding 267 *supra.*)

[121] See *Satellite Cellular* Findings 467-470 *supra*,and *Crystal Communications* Findings 519-524 *supra.*

mon Carrier Bureau made good faith efforts to secure documents that could reasonably lead to the adduction of admissible evidence. See *e.g.* Motion to Compel Production of Documents from *Cellular Pacific et.al.* filed by AALA/CFL (July 18, 1991); Renewal of *Motion to Compel Production of Documents and Request for Imposition of Sanctions* filed by Miller-Skywave on October 16, 1991; *Motion for Production of Documents* filed by Chief, CCB on August 16, 1991; and *Motion to Compel Production of Documents from Cellular Pacific et.al.* filed by the Chief, CCB on September 25, 1991. Cellular Pacific simply refused to fully respond to these requests.

556. During the hearing it developed that Cellular Pacific had deliberately withheld relevant documents. For instance Cellular Pacific had produced some documents on October 15, 1991. But, at that time they did not produce a letter from William Franklin to Eric Leong dated October 17, 1988 until November 12, 1991 (Tr.10034). Eric Leong admitted that he had actually found the Franklin letter in his files and read it shortly after his deposition in August 1991.

557. Similarly, Wallace Leong failed to produce his TCC service agreement and the addendum showing the areas he chose for the RSAs until November 12, 1991 (Tr.10009). November 12, 1991, was the 33rd day of hearing (Tr.Vol.33).

558. Even though Cellular Pacific was fully aware that their California 11 (El Dorado) RSA application was under a cloud, their Business Coordinator (See Findings 535-536 *supra.*), Eric Leong, pushed ahead with efforts to construct and operate their California 11 RSA. First, he negotiated a construction, management, and operating agreement with TCC's *alter ego*, Crystall Communications (See Footnote 61 *supra.*; Tr.10197-10200, 10246). Wallace Leong executed that agreement on behalf of Cellular Pacific (Tr.10022, 10199). That partnership aborted sometime in 1989 or 1990 because of potential Securities and Exchange Commission violations and other problems caused by Crystall's presence in the agreement (Tr.10044, 10200-10206).

559. In February 1990, Cellular Pacific contracted with Cellular Engineering, a firm headed by Jamal Fakory, a former TCC employee (Tr.1806, 9781, 10043-10044, 10232).[122] Fakory was hired to negotiate a construction deal with McCaw Communications and to oversee the construction of the California 11 RSA system (Tr.9781, 10334). According to April Leong and Wallace Leong, Fakory is presently managing the system which is operational with about 80 subscribers and roamer traffic (Tr.9779-9781, 10043).[123]

560. *Intermediate Facts.* Cellular Pacific's construction permit for the California 11 (El Dorado) RSA will be revoked. They lack the character qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with other non-wireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

561. Equally important, Cellular Pacific has falsely certified their California 11 RSA application in violation of 47 CFR 22.923(b)(7). On July 7, 1988, Wallace Leong certified that that application was ". . .complete in every respect and contains all of the information required by the FCC Form 301 and the Commission's Cellular rules." That certification proved false. The record supports the finding that at the time he certified, Wallace Leong (at most) had only the signature pages and transmittal signature pages before him, and he knew that. Such falsification forms a separate and independent reason for revoking Cellular Pacific's California 11 construction permit.

562. Next, Cellular Pacific has egregiously violated 47 CFR 1.65. On July 7, 1988, when Wallace Leong certified the California 11 application he represented ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." The California 11 application was filed on July 22, 1988. Technically Wallace Leong's representation was accurate on that day. But he knew or should have known that Cellular Pacific was about to become a participant in a multi-lateral risk sharing agreement (See Findings 534 and 535 *supra.*).

563. When two months later (September 22, 1988) Cellular Pacific, did in fact join the West Coast Mutual Risk Sharing Agreement, they became obligated to report that decisionally significant event to the Commission under 47 CFR 1.65. They deliberately didn't do so. The won the California 11 lottery on October 9, 1988. Still they didn't report the MCRSA's existence. They received their California 11 RSA construction permit on July 19, 1989. Still they didn't report the MCRSA's existence. It was not until after TCC West Coast broker Eric Leong who was also Cellular Pacific's Business Coordinator (Finding 536 *supra.*) met with the powers-that-be in the Newark Airport on October 17, 1989, that the licensee decided to comply with 47 CFR 1.65 (See Finding 550 *supra.*).

564. The Commission cannot afford to countenance this type of deliberate deceit. No applicant nor permittee can be permitted to jam up the Commission's RSA allocation policy and procedures. To deliberately allow the Commission to process some 428 falsely certified RSa applications places an unconscionable burden on the Commission's resources. This mass violation of 47 CFR 1.65 forms still another reason for revoking Cellular Pacific's California 11 (El Dorado) RSA application.

565. Cellular Pacific has also abused the Commission's discovery processes. They tried to make certain that all counsel (their opponents' as well as their own) were prepared for hearing. However, a few did not. A few parties deliberately stonewalled discovery. They deliberately with-

[122] Jamal Fakory testified in this proceeding on another construction and operating agreement and his relationship with then licensee, Edison Cellular (See Tr. Volume 43, pp.13006-13220; and Footnote 2 *supra.*). The Trial Judge was totally unimpressed with Fakory's capacity for truth and veracity. In addition, he wasn't at all impressed with Fakory's ability to construct and/or operate a cellular system. Fakory dissembles, willingly.

[123] This information is based solely on oral testimony. No business records were produced. Moreover it appears that the Cellular Pacific partners have put up no money of their own. It is McCaw that provided the financing and the equipment (Tr.9782).

held relevant documents apparently in the hope of getting less than a full and complete record developed on their applications. Cellular Pacific was one of those.

566. Cellular Pacific complied with some discovery requests but ignored others. Even when they complied, they didn't do so in a timely manner. They were still producing documents on the 33rd day of hearing. Moreover, Cellular Pacific's witnesses displayed a cavalier attitude toward their stonewalling tactics. They weren't the least bit sorry that they were concealing the search for the truth. In fact they were almost proud of it. Under these circumstances an adverse finding against Cellular Pacific under Issue L-7 is warranted, and the preliminary conclusion is that this type of abuse of discovery is not what the Commission expects of its applicants and licensees.

567. Cellular Pacific has submitted no mitigating circumstances for its misconduct. Even their assertion that their California 11 (El Dorado) RSA system is operational has not been persuasively pleaded. So revocation of Cellular Pacific's California 11 RSA construction permit is mandated.

North American Cellular

568. North American Cellular, an Hawaiian General Partnership, is composed of 23 partners: (1) Leslie N. H. Au; (2) Gart A. W. Auyong; (3) Ellen Chew; (4) Paul K. Chong; (5) Rodney K.F. Chong; (6) Amy A. Chun; (7) Glenn P. Davis; (8) Maelyne J. Dimond; (9) Benjamin Y.L. Dimond; (10) Fred Y. Hirayama; (11) Walter J. Kokobun; (12) Margaret W.H. Lau; (13) Alvin D.S. Lau; (14) Elinor I. Leong; (15) Russel Kwai Sun Kui; (16) Wayne K. Matsumoto; (17) Steven K. Nakadka; (18) Shirley A. Nakatsu; (19) Bonnie Lisa Pestana; (20) Robert K. Tanaka; (21) Ernest M. Tanaka; (22) Malcolm t.K. Tyau; and (23) Gail Yogi.

569. The organizer and business coordinator of North American is TCC's Hawaiian broker, Eric Leong. North American is one of three partnerships he organized and manages (See Findings 532-536 *supra.*). He has always been North American's business coordinator, but since February 1990 he has been paid $3,000 per month to save as business coordinator (Finding 536 *supra.*).

570. Eric Leong selected his wife, Elinor Leong (Finding 568 (14) *supra.*) as the signing and managing partner for North American (North American Ex.1; Tr.10285). Elinor Leong had been successful in the MSA cellular allotment program. TCC then sent her promotional literature for RSAs. She ended up swapping her share of the Atlantic City, New Jersey MSA alliance for her 22% interest in North American (Tr.10281, 10285; CCB Ex.292A). The other North American partners did not vote on her becoming the signing partner. (Tr.10136-10137, 10285-10286).

571. North American was formed on or about June 22, 1988. Elinor Leong realized that the reason for forming partnerships was so they (North American) could file more applications (See North American Ex.1, ATT A; Tr.10286, 10292).

572. During the summer of 1988 TCC sent North American RSA applications to Elinor Leong for signature. This included the application for the Idaho 1 (Boundary) RSA which she signed on July 27, 1988. The Idaho 1 RSA application was filed on August 12, 1988 (Tr.10288). When she signed the Idaho 1 application Elinor Leong certified *inter alia* that the application was ". . .complete in every respect and contains all of the information required by the FCC Form 301 and the Commission's cellular application rules."

573. At the hearing it developed that this certification was false. She couldn't remember what TCC had sent her (compare with Findings 456 and 474 *supra.*). She could recall only ". . .receiving envelopes full of a lot of papers." She further admitted that she only "glanced through" the applications (Tr.10289-10290).

574. When she signed the Idaho 1 RSA application on July 27, 1988, Elinor Leong also certified "that there are no agreements or understandings other than those specified in the application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ."

575. In the August/September 1988 time period TCC broker Eric Leong got the details underlying the risk-sharing concept from TCC broker Tye St.James. (See Finding 542 *supra.*). Eric, in turn, explained revenue sharing to his wife. He explained that they would be sharing 50% distributions, that there were some risks the FCC wouldn't approve the agreement, and that TCC attorney, William Franklin had drafted a Mutual Contingent Risk Sharing Agreement (Tr.10292, 10294, 10299).

576. After the initial telephone call from St.James, Eric Leong called the North American members. He explained the revenue sharing concept to them and obtained their approval to enter into the arrangement (Tr.10170-10171, 10339).

577. Since she was a signing partner, Eric Leong invited Elinor Leong to be in on the now infamous September 20, 1988 West Coast conference call. (See e.g. Findings 506-507 *supra.* and the citations listed in that paragraph). However, she was not present at that call, and her husband briefed her on what was discussed during that conference call (Tr.10299, 10300, 10302). Eric also told Elinor that the other North American partners had given telephone approval to the partnership entering into the MCRSA (Tr.10302).

578. On September 20, 1988, Elinor Leong received a note from Tye St.James. She knew that St.James was another TCC broker (Tr.10307-10308). The note was in an express mail envelope addressed to Eric (Tr.10308; CCB Ex.288). The signature page for the MCRSA was enclosed. St.James instructed her to sign on line #7 with the partnership name and have her signature notarized before Friday, September 23, 1988, the date of the first lottery drawing. (Tr.10303, 10308, 10318).

579. Elinor Leong signed on line #7 and had it notarized on September 22, 1988. (Tr.10304-10306, CCB Ex.1; AALA/CFL Ex.256 at 6). Elinor also instructed another one of Eric's clients, Wilfred Motosue, to sign the MCRSA's signature page (Tr.10313). At the time she signed Elinor Leong was fully aware that there were other partnerships entering into the MCRSA (Tr.10316).

580. After she signed the MCRSA, the North American partnership (like the Cellular Pacific partnership-Findings 548 *supra.*) followed the St.James ratification procedure. St.James sent Elinor a sample ballot. She had copies of the ballot made and sent to all the North American partners. Each partner "[w]ith knowledge of the risks and rewards of the Mutual Contingent Revenue Sharing Agreement for fourteen partnerships" voted in favor of the MCRSA

(Tr/10314-10315; CCB Ex.287).[124] Elinor Leong has seen a document which lists the fourteen partnerships to the MCRSA (TR.10318-10319).

581. On December 12, 1988, North American won the lottery for the Idaho 1 (Boundary) RSA, and became the tentative selectee for that market (Tr.10320; CCB Ex.311). They were granted their Idaho 1 construction permit on July 19, 1989 (CCB Ex.313).

582. During the late summer or early fall of 1989, the topic of the day among TCC generated partnerships was whether the MCRSA should be disclosed to the FCC. On October 17, 1989, Eric Leong attended the critical meeting at the Newark Airport where the wisdom of disclosure was the primary topic (See Finding 550 *supra.* and citations listed there).

583. After receiving the October 26, 1989 Malecki memorandum, and William Franklin's October 27, 1989 letter, Eric Leong discussed disclosure with Elinor Leong. Elinor, too, had received Franklin's recommendation that North American disclose the MCRSA's existence to the FCC. (See Finding 550 *supra.*; Tr.10323).

584. In a letter dated October 31, 1989, signed by Elinor Leong, and addressed to the Chief, Mobile Sources Division, North American revealed "that North American Cellular is a signatory to a multilateral agreement" (CCB Ex.289; Tr.10323).

585. On December 12, 1989, Elinor Leong, on behalf of North American, signed an "Agreement to Rescind Risk-Sharing Agreement" (CCB Ex.290). There she purported to "rescind, void and terminate the Agreement as if it never had been entered into." (Tr.10329). Before she signed the rescission document, Eric Leong called the North American partners and got their approval (Tr.10334).

586. Eric Leong then telecopied the executed rescission to Brown, Finn and Neitert who in turn forwarded it to the FCC. (CCB Ex.290; Tr.10332; also see Finding 553 *supra.*) After signing the rescission agreement, North American conducted a written partnership vote to affirm the rescission. Elinor Leong prepared the rescission ballots and mailed them to all the partners. On or about January 15, 1990, the North American partners executed those affirming ballots, and sent them back to Elinor Leong (Tr.10333; CCB Ex.291).

587. In addition to the regular issues designated against them, North American Cellular also faces an abuse of process issue (Para.9, Issue L-7 *supra.*) Under Issue L-7 we must determine whether North American abused the Commission's processes by failing to comply with valid discovery requests (See Finding 554 *supra.* and Footnote 20 citations for the other three West Coast partnerships who similarly abused the Commission's processes).[125]

588. The background leading up to North American's abuse has already been covered and needs no repeating. (See Findings 460-470, 518-526, 554-557). Initial discovery in the case was to have been completed on or before August 29, 1991 (See FCC 91M-1799 released June 5, 1991 at para.5). As of August 1991 Elinor Leong had not even contacted the other North American partners to request that they "produce documents relevant to risk sharing." (Tr.10345). Instead she simply asserted that no documents regarding risk sharing existed (Tr.10345), an assertion completely belied by the entire record. Indeed the record demonstrates that initially North American made absolutely no attempt to comply with reasonable and legitimate discovery procedures.

589. North American did produce some documents on October 15, 1991 (the sixteenth day of hearing), and some on November 12, 1991 (the thirty-third day of hearing). That hardly constitutes compliance. It should be noted that documents they finally produced on November 12, 1991, contained relevant evidence. For instance they included the checks North American gave TCC to purchase applications; they also included William Franklin's October 1988 retainer letter. (See Stipulation between Chief, Common Carrier Bureau and North American dated December 6, 1991; Tr.10294, 10320).

590. Even though North American was fully aware that their Idaho 1 (Boundary) RSA was under a cloud, their Business Coordinator, Eric Leong pushed ahead with efforts to construct. First he negotiated a construction, management and operating agreement with TCC's *alter ego* Crystall Communications. See Findings 558 *supra.* Elinor Leong executed that agreement on behalf of North American in July, 1989. That contract aborted. (Finding 558 *supra.*).

591. So (as in the case of Cellular Pacific) North American then contracted with Cellular Engineering, a firm headed by Jamal Fakory. Fakory was hired to negotiate a deal with McCaw which he did (Finding 559 *supra.*). McCaw provided all the financing and the equipment. Fakory currently manages the system on a day-to-day basis. Elinor Leong claims to have or claims to have had some management responsibilities (Tr.10334, 10335; Finding 559 and Footnotes 121-122 *supra.* According to Elinor Leong's oral testimony the Idaho 1 system is operational with about 273 subscribers and some roamer traffic (Tr.10335).

592. *Intermediate Findings.* North American's construction permit for the Idaho 1 (Boundary) RSA will be revoked. The partnership lacks the character qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreement with 13 other nonwireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.9222.

593. Equally important, North American has falsely certified their Idaho 1 (Boundary) RSA application in violation of 47 CFR 22.923(b)(7). On July 27, 1988, Elinor

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[124] In their response to the Bureau's request for admissions, North American denied having signed ballots in favor of the MCRSA (Tr.10343-10344).

[125] Certain West Coast partnerships have displayed an overt disdain for the Commission's adjudicatory process. Satellite Cellular, Crystal Communications, Cellular Pacific and North American stonewalled discovery; Jack Thompson (Data Cellular); Betty Thompson (Satellite Cellular) and Elsa Borcherding (Satellite Cellular) openly solicited *ex parte* presentations from various members of the Congress in violation of 47 CFR 1.120; and the following West Coast witnesses displayed a propensity to play fast and loose with the truth; i.e. they certainly didn't take their oath seriously: (1) Betty Thompson; (2) Eric Leong; (3) Wallace Leong; (4) April Leong; (5) Elinor Leong; and (6) Ellen Kirwan.

Leong certified that that application was ". . .complete in every respect and contains all of the information required by the FCC Form 301 and the Commission's cellular rules." That certification proved false, and signing partner, Elinor Leong knew or should have known it was false. She had no factual basis whatsoever for her certification. The most she can say is that she received envelopes full of lots of papers which she only "glanced through." This false certification forms a separate and independent reason for revoking the Idaho 1 RSA construction permit.

594. Next, North American has egregiously violated 47 CFR 1.65 of the Commission's rules. On July 27, 1988, Elinor Leong, in the Idaho 1 RSA application, represented ". . .that there are no agreements or understandings other than those specified in the application which provide that someone other than those specified in the application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." The Idaho 1 RSA application was filed on August 12, 1988. Technically Elinor Leong's representation was accurate on that day. But she knew or should have know that North American was about to become a participant in a multilateral risk sharing agreement. Her TCC-broker-husband, Eric Leong certainly did.

595. In any event, when less than a month and a half later when she signed the 14-party MCRSA on North American's behalf North American became obligated to report this decisionally significant event to the Commission under 47 CFR 1.65. But North American didn't. A short time later, the partnership, "with full knowledge of the risks and rewards" of the MCRSA, ratified the agreement. Still they didn't report it.

596. On December 12, 1988, North American won the Idaho 1 (Boundary) RSA lottery. Still they didn't report the MCRSA's existence to the Commission. On July 19, 1989, the Commission gave North American a construction permit for the Idaho 1 RSA. Still they didn't report the MCRSA's existence. It wasn't until *after* North American's business coordinator, and TCC broker Eric Leong attended the strategy session that the powers-that-be held in the Newark Airport on October 17, 1989, that North American decided to comply with 47 CFR 1.65.

597. The Commission cannot countenance this type of deceit. No applicant or permittee can be permitted to jam up the Commission's RSA allocation machinery.[126] To deliberately allow the Commission to process some 428 falsely certified RSA applications places an unconscionable burden on the Commission's processes.

598. North American has also abused the Commission's discovery processes. Document production and exchange is at the very heart of administrative pretrial preparation. This permittee showed only open disdain for that procedure. They produced some documents on the sixteenth day of hearing, and some on the thirty-third day of hearing. This isn't the type of permittee the Commission and the public wants or needs.

599. North American has submitted no mitigating circumstances worth analyzing. Even their oral assertions that their Idaho 1 (Boundary) RSA system is operational hasn't been persuasively pleaded. Thus North American's misconduct stands unmitigated. Revocation of North American's Idaho 1 (Boundary) application is mandated.

Bravo Cellular

600. Bravo Cellular, a California general partnership has 20 partners: (1) Kosh Communications;[127] (2) N.A.S.A.I.M. Trust;[128] (3) Robert Allen; (4) Bonnie Brokaw; (5) Halpin Communications;[129] (6) Simmons Communications;[130] (7) Logan Communications, JV5;[131] (8) Loomos Communications JV5;[132] (9) Kosh Communications RSA2;[133] (10) Kelly Communications RSA 9;[134] (11) Edwin J. Eckert; (12) Kosh Communications JV 10;[134] (13) Theodore E. Kampen; (14) Kosh Communications RSA 3;[134] (15) Kosh Communications RSA 3;[134] (16) Kosh Communications RSA 5;[134] (17) Kosh Communications RSA 6;[134] (18) Kosh Communications RSA7;[134] (19) William C. Smith; (20) Atnip-Hogue Telecommunications;[134] (Buckhead Ex.14).

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[126] This is one of the very ills 47 CFR 1.65 is aimed at preventing i.e. wasting the taxpayer's money needlessly processing otherwise returnable or dismissible applications.

[127] Kosh Communications is wholly owned by TCC broker, Phillip Kosh.

[128] N.A.S.A.I.M. Trust is made up of two of TCC brokers, Doc Scott's children: Michael Alan Scott, and Sally Dawn Cobb. Each owns 50%.

[129] Halpin communications is owned 50% by John Halpin and 50% by Norene Halpin.

[130] Simmons Communications is owned 100% by Robert Simmons.

[131] Logan Communications JV-5 has 10 ten-percent owners: (1) Francis and Geraldine Demain; (2) Tommy Griffin, Jr. (Griffin Investments); (3) Norman Isbell; (4) Stanley and Susan Logan; (5) Monica Lollar; (6) Ray Lollar; (7) Tewalt Parley; (8) Dennis and Debra Tino; (9) Frank L. Williams, Jr.; and (10) John K. Williams.

[132] Loomis Communications RSA 1 has 15 owners with the following ownership percentages (1) Edward and Faye Allen II-4%; (2) Chastulik, James Hiernan, JoAnn and Karen Johnson - 4%; (3) Robert and Honora Kramer - 4%; (4) Frank and Carol DeLucia - 4%; (5) Rita K. Freeman - 4%; (6) Victoria Johnson - 16%; (7) Lane Lallar - 20%; (8) Ray Lollar - 8%; (9) Donakl and Diane Looma - 4%; (10) Robert and Karen Powell - 4%; (11) Aurora Spargur - 8%; (12) Parley Tewalt (PDT Trust) -4% (13) Julia Ward - 8%; (14) Nicholas E. and Christine Loomis - 4%; and (15) Vicki Ward - 4%.

[133] The ownership showing for Kosh Communications RSA2 is incomplete. Only the names of 15 four-percent and 1 two-percent (62%) owners were included in the exhibit: They are: (1) Robert Atilquist - 2%; and the following 4% owners: (2) Lynn E. Atrup (See para. 600(20) *supra.*); (3) Geneva Brunner; (4) Charles DeFazio and Paul Nelson; (5) Alfredo Franco; (6) John and Norene Halpin (See Footnote 128 *supra.*); (7) James and Susan Herrick; (8) Timothy and Barbara Johnson; (9) Victoria Johnson (10) Bela and Esther Kahancza; (11) Esther and Karl Kahancza; (12) Isolt Kahancza; (13) Laura Ann Latronica; (14) John K. Martin; (15) Linda Martinez; and (16) Arrit Allan McPherson.

[134] No ownership structure was included in Bulkhead Ex. 14 for (1) 38% of Kosh Communications RSA 2; (2) Kelly Communications RSA 9; (3) Kosh Communications JV 10; (4) Kosh Communications RSA 3; (5) Kosh Communications RSA 4; (6) Kosh Communications RSA 5; (7) Kosh Communications RSA 6; (8) Kosh Communications RSA 7; and (8) Atnip-Hogue Communications. Thus we know generally who compose Bravo (alleged 20 partners) but we do not know the name of many of the individual owners.

601. The organizer, manager, part-owner and signing partner of Bravo is TCC broker, Phil Kosh. Kosh, who is also a financial consultant, was the only Bravo partner to testify at the hearing (Bravo Ex.1, p.1; Tr.9157, 10662, 10668). For several years Kosh has worked closely with TCC broker Neil Alan (Doc) Scott, Ph.D., D.D., Economist, Theologian and Financial Consultant. In that capacity he has sold interests in real estate limited partnerships, oil and gas investments, insurance, rare coins and water machines. Kosh obtained a Commodity Pool Operations license that allowed him to bring investors into a commodity pool to be traded by a professional trader. He currently manages partnerships and trust funds (2 CCB Ex.255; Bravo Ex.1, p.1; Tr.9092, 9094, 9097.

602. During the MSA allocation rounds Kosh worked indirectly for TCC through Doc Scott. Scott received an override on all Kosh MSA sales; Scott paid him his commissions (Tr.9097-9098, 9102, 10780-10781). Kosh also invested in MSAs, and was successful because of alliances. Most of Kosh's clients joined alliances (Tr.9097-9098, 9115). Kosh was aware of the FTC proceeding (Tr.9108; Findings 21-24 *supra.*)

603. In 1986 Kosh started selling RSAs. In 1987 or 1988, he bought RSA applications. Kosh and some of his clients attended a TCC Seminar in Oceanside, California on May 27, 1987 (AALA/CFL Ex.373; Tr.9119, 9121, 9124-9126). There he heard TCC's Nicholas Wilson say that even if the FCC did away with alliances, TCC would implement a business plan which would do the same thing as alliances (See Finding 28 *supra.*; Tr.9119, 9120-9123; AALA/CFL Ex.269, and Ex.373).

604. Kosh and some of his clients also attended another TCC Seminar in Oceanside, California on June 7, 1988. There the TCC partnership program was discussed, as was the concept of linking them together to reduce the risks (CCB Exs.250-254; Tr.9135-9137, 9144-9145). Kosh also discussed linking with his clients as well as with Doc Scott. Doc Scott told Kosh to keep the MCRSA confidential (Tr.9148-9149, 9202).

605. It was right after the June 7th Seminar that Kosh and Scott collaborated to form Bravo (See Finding 604 *supra.*; CCB Ex.253; CCB Ex.255). The majority of the Bravo investors are Kosh's (See Bravo Ex.1; para.4; Tr.9240-9241). However, the original application shows that 37.23% (but see *infra.*) of Bravo is owned by a trust that Doc Scott formed in favor of his two children (Buckhead Ex.14, p.8; Tr.10620; Footnote 128 *supra.*). Scott appointed Kosh Bravo's manager and signing partner (Tr.9139-9140, 10662-10688). It was Kosh who opened up and controlled the Bravo banking account (Tr.9142). In 1988 the Bravo partners paid Phil Kosh $7400 for services performed as Bravo's initial partner.

606. The record evidence casts serious doubts about Bravo's ownership structure. In fact, we have at least 3 different partnership structures. In its application filed with the Commission, Bravo listed 20 partners (Buckhead Ex.14).[135] In their direct case, they represent that they have only 19 partners (Bravo Ex.1). However, in a partnership memo dated August 12, 1988 (CCB Ex.163), Kosh lists 22 partners. Thus, somewhere along the line, Bravo has misrepresented its ownership structure.

607. For example, in the original application (Buckhead Ex.14) Bravo states that one of its partners is "Kosh Communications RSA 5." No such entity is listed in Bravo's direct case (Bravo Ex.1). However, Kosh did sign an MCRSA ballot for "Kosh Communications RSA 5" (See CCB Ex.172, TSJ.0097). In the August 12, 1988 partnership memo, Kosh lists the 20 partners in Buckhead Ex.14 *plus* an Edna White (4% equity) and a Charlotte J. White (3% equity). (See CCB Ex.163).

608. In its original filing Bravo represented that one of the partners, NASA IM Trust, owned 37.23% of the partnership. In its direct case presentation (at Bravo Ex.1, Bvc 14), Bravo fails to list an ownership percentage for NASA IM; but Bravo's MCRSA ballot for the NASA IM Trust (CCB Ex.172, TSJ0105) indicates that the Trust owns only 30.231% of the partnership. Note that the 7% difference (37.23% minus 30.23%) could mean that a post-filing transfer to Edna White (4%) and Charlotte White (30%) took place. See Finding 607 *supra.*

609. In its original filing Bravo states that one of its partners is "Kosh Communications JV10." No such entity is mentioned in Bravo's direct presentation. However, Bravo's direct presentation does list as one of its partners "Kosh Communications JV5." No such partner is listed in Bravo's original filing. Neither "Kosh Communications JV5" nor "Kosh Communications JV10" submitted an MCRSA ballot. (See CCB Ex.172). Apparently Bravo partners "Logan Communications" and "Kelly Communications RSA 9" never submitted MCRSA ballots. On the other hand both Kosh and Doc Scott represented to the other Bravo partners that both Kelly Communications RSA 9 and Logan Communications JV-5 had affirmatively voted for the MCRSA (CCB Ex.162-163).

610. On June 16, 1988, Kosh sent a letter to his clients. There he pointed out that they had a 100% chance of winning if they joined one or more partnerships. He said, "this linking has the same effect as joining an alliance." (Tr.9154; AALA/CFL Ex.391).

611. Doc Scott called Phil Kosh and asked him to participate in the now infamous September 20, 1988 West Coast Conference call. (See Finding 506-597 *supra.*, and the citations listed there). Kosh was in on that call (Tr.9159). During the call Kosh made it clear that his partners would not agree to go into RSAs unless they had linking (AALA/CFL Ex.28, p.33; Tr.9163). He also asked questions and entered into a conversation that establishes that at the time of the call he had a copy of the August 26 version of the Mutual Contingent Risk-Sharing Agreement before him (See AALA/CFL Ex.28 at pp.23, 25, 27, 28).

612. Kosh received the Execution document and the signature page o:f the MCRSA on September 22, 1988. He was aware that it was important to sign the MCRSA before September 23, 1988 (the date of the first lotteries). So, pursuant to telephone instructions, Kosh initialled the first page of the Execution Document and changed the draft date of the Agreement from 8-26-88 to 9-20-88. Then he

[135] As noted Buckhead Ex.14 is woefully incomplete on the subject of the partnerships' individual names. But that is a separate problem entirely, and doesn't affect the above analysis whatsoever.

signed for Bravo Cellular at the place indicated for "Participant #3'" and had his signature notarized (AALA/CFL Ex.256, pp.22-26; Tr.9167-9170, 9285, 9309)

613. At the time he signed the MCRSA, Phil Kosh knew that it was an important document. He was aware that Doc Scott had called the Bravo partners and asked for a vote. And he was further aware that the partners had given him discretion to enter into the MCRSA if counsel found it complied with FCC rules (Tr.9174, 9255, 9309; CCB Ex.269, p.2). Kosh kept a copy of the pages he initialled and signed, and he returned the original signature to TCC promptly after signing them. (Tr.9287-9288, 9315-9317).

614. Seven days later (on September 29, 1988), Kosh signed, *inter alia.*, Bravo's application for the North Carolina 15 (Cabarrus) RSA. (Buckhead Ex.14). There he certified that that application he had before him was ". . .complete in every respect and contains all of the information required by the FCC Form 401 and the Commission's cellular application rules. . ." At the hearing it developed that Kosh had absolutely no basis for so certifying. The only materials TCC sent him, and that he had before him on the day he certified were the signature pages (Tr.9188; CCB Ex.270).

615. When Kosh signed the North Carolina 15 RSA application on September 29, 1988, he also certified that ". . .there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." When he so certified he mush have known that just seven days before he had committed Bravo to a 14-party multilateral mutual contingent risk-sharing agreement. He also realized that he had committed himself to signing and filing some 428 RSA applications on Bravo's behalf - the very procedure the Commission was attempting to curb.

616. Shortly after Phil Kosh had bound Bravo to MCRSA, Bravo followed the Tye St.James ballot ratification procedure (See Finding 580 *supra.*). Doc Scott sent ballots to the Bravo partners (CCB Ex.238). The partners executed ballots in favor of the MCRSA (CCB Ex.172; Tr.9178-9179). Kosh testified that he had also polled some partners (Tr.9177). On October 10, 1988, Doc Scott sent a letter to, *inter alia*, the Bravo partners. There he stated in part:

> "As of October 6th, the "YES" vote in ALPHA is a whopping 96% and in BRAVO, also 96%.[136] Copies of our telecoms, recorded with advance notice, were sent in time to the other managers and Phil; affirming these votes. So 14 of us are "LINKED."
>
> ...
>
> "Second, by this superb contractual "LINKING" YOU'VE ALREADY WON potentially!. . .[At the October 7th FCC lottery]. . .TWO of our 14 Groups (not yet Alpha and Bravo) WON. . ."

617. Kosh kept both the Alpha and the Bravo partners up-to-date about linked partnership wins (CCB Exs. 189, 257, 258; Tr.9201). He fully expected that Bravo could and would claim their share of the profits of other partnerships involved in the linking. As of May 25, 1989, Kosh believed that Bravo was entitled to seven wins out of the fourteen groups (Tr.9340, 9363; CCB Ex.242).

618. On November 10, 1988, Bravo (via TCC) filed the North Carolina 15 (Cabarrus) RSA application that Phil Kosh had signed on September 29, 1988 (See Finding 614 *supra.* and Buckhead Ex.14). Bravo won the North Carolina 15 RSA lottery on September 20, 1989, and became the tentative selectee for that market (CCB Ex.311).

619. On November 11, 1989 (well after the critical October 17, 1989 meeting at the Newark Airport),[137] Bravo submitted an amendment to the FCC. The amendment was signed by Phil Kosh and for the first time disclosed ". . .the existence of a multilateral agreement to which the applicant is a party. . ." The supplement to the amendment described the MCRSA and states that Bravo ". . .entered into the Agreement in September 1988" (Buckhead Ex.15).[138]

620. On December 12, 1989, Phillip Kosh, on Bravo Cellular's behalf, signed an "Agreement to Rescind Risk-Sharing Agreement." There he committed Bravo ". . .to rescind, void and terminate the Agreement as if it had never been entered into." Kosh further averred that "[t]he person executing this Rescission on behalf of the Participant named below represents and warrants that he or she if fully authorized to execute and deliver this rescission on behalf of such participant. . ." David Kaufman of Brown, Finn and Neitert filed a copy of that Agreement with the FCC on December 19, 1989. (Buckhead Ex.16; Tr.9304). When Kosh signed the Rescission Agreement he fully intended that the FCC rely on the truthfulness of the statements in it (Tr.9306-9307).

621. *Intermediate Findings.* Bravo Cellular's North Carolina 15 (Cabarrus) RSA application will be denied for any one of several reasons. In the first place, and most fundamentally, Bravo has not sustained the legitimacy of its ownership structure. The ownership structure they submitted to the Commission in their cellular application (Buckhead Ex.14) differs in several significant respects from the two different ownership structures that were identified, offered, and accepted into evidence at the hearing (See Findings 606-609 *supra.*)

622. It is a fundamental tenet of any allocation scheme (even a lottery) that the allocator knows exactly who they are granting or denying. And accurate ownership representations became indispensable when the allocator must process over 11,500 applications (See Finding 33 *supra.*) filed by one application processor alone (TCC).

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[136] How Doc Scott came up with the "96%" figure is a mystery. If the ownership percentage figures at Buckhead Ex.14, p.5 are accurate and if neither Kelly Communications RSA A 9 (1.23%), nor Logan Communications JV5 (6.15%) filed a MCRSA ballot (See Finding 609 *supra.*), there is no way anyone could come up with a 96% "YES" vote.

[137] A member of Bravo's law firm, Brown, Finn, and Neitert attended that October 17th meeting (Tr.11873, Finding 266 *supra.*).

[138] Bravo also submitted changed addresses for several of the partners in their November 11, 1989 amendment. There Bravo submitted a change of address for "Kosh Communications JV10;" but they did not submit an address change for "Kosh Communications JV5" (See Finding 609 *supra.*).

623. The faulty ownership structure is nobody's fault, but Bravo's. It is they who have submitted conflicting ownership structures. It would be the height of folly for the Commission to grant an applicant with such dubious identity.

624. In any event, and looking at whatever ownership structure, Bravo lacks the basic qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with 13 other nonwireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

625. Equally important, Bravo falsely certified their North Carolina 15 RSA application in violation of 47 CFR 22.923(b)(7) at least twice. When Bravo's signing partner and manager, Phil Kosh certified that application on September 29, 1988, he represented that the application was ". . .complete in every respect and contains all the information required by the FCC Form 401 and the Commission's cellular application rules." He had absolutely no factual bases for making such a certification, and he knew it. The only materials TCC sent him, and that he had before him on September 29, were signature pages. This qualifies as a misrepresentation under 47 CFR 22.923(b)(7).

626. On September 29, 1988, when he certified Bravo's North Carolina 15 RSA application, Kosh also certified that ". . .there are no agreements or understandings, other than those specified in the application which provide that someone other than the applicant shall have an indirect or direct ownership interest. . ." That certification was false, and Phil Kosh knew it was false. Just the week before as signing partner he had committed Bravo to a 14-party multilateral mutual contingent risk sharing agreement. He was also aware that he had signed and/or would sign and file some 428 RSA applications on Bravo's behalf - the very mass filing the Commission was trying to avoid.

627. These misrepresentations (Findings 624-625 *supra.*) are serious. They go right to the heart of the cellular application process. Thus, they form a separate and independent reason for denying Bravo's North Carolina, 15 RSA application.

628. Next, Bravo has violated 47 CFR 1.65. On September 22, 1988 when they entered into the fourteen party risk-sharing agreement they became obligated to report that substantial and significant change in their status to the Commission. But they deliberately did not do so. They considered their entry into the MCRSA important enough to call for partnership ratification. The partnership ratified the Agreement on October 6, 1988. But still they didn't report the Agreements' existence to the FCC.

629. On November 10, 1988, Bravo filed their North Carolina 15 RSA application with the Commission. But they deliberately didn't mention the MCRSA's existence. On September 20, 1989, almost a year later, Bravo won the North Carolina 15 RSA application lottery. Still they didn't tell the FCC about their MCRSA. It was not until a month (November 21, 1989) after their counsel had met with the powers-that-be in Newark, that Bravo finally owned up to ". . .the existence of a multilateral agreement to which the applicant is a party. . ."

630. In brief, Bravo Cellular willingly joined with all the permittees and licensees in this proceeding in the attempted cover-up. They were a willing participant in TCC's efforts to hide the MCRSA's existence from the FCC. It was not until somebody had the common sense to realize that it was virtually impossible to cover up the existence of an agreement involving 11,500 applications (See Finding 33 *supra.*), that the permittees and licensees involved got religion. Deceit on this large a scale takes chutzpah. But certainly this group had it (See findings 18-27 *supra.*).

631. Bravo's attempts at mitigation are not only feeble they are outright prevarications. At the hearing Kosh suddenly asserted that when he signed the MCRSA on Bravo's behalf he didn't have a copy if the Agreement's terms and conditions before him (Tr.9105, 9168, 9269 and 9271).

632. That assertion is totally contrary to the rest of the evidentiary record. For example, it is contrary to Kosh's own March 30, 1990 statement under penalty of perjury that was submitted to the FCC (CCB Ex.269, para.6 Tr.9149). A close reading of the transcript of the September 20, 1988 conference call indicates that Kosh had a copy in his possession at the time. Tye St.James swore he sent Kosh a copy of the terms and conditions before the September 20, 1988 conference call (Tr.9266-9267, 9411.

633. In summary (Findings 621-630 *supra;)* there are at least six separate and independent reasons for denying Bravo Cellular's application for the North Carolina 15 RSA.

Alpha Cellular

634. Alpha Cellular, a California general partnership, has 18 partners: (1) Kenneth F. Aull; (2) Clyde Bridgeman; (3) Grover Bridgeman; (4) Walter J. Butts; (5) Robert C. Chapman; (6) James D. Cox; (7) Judith A.W. Kinder; (8) Daisy L. Kozak; (9) Janice R. Mehl; (10) Mary Lois Oliver; (11) Deborah R. Parker; (12) Cecile A. Selkirk; (13) Orval O. Oliver; (14) Louise Robinson; (15) Maude E. Strang; (16) Woodrow Thornhill; (17) Derek M. Williams; and (18) Mildred P. Williams (Buckhead Ex.39, pp.4-5).

635. The formulator, organizer and Guru of Alpha Cellular is TCC broker Neil Alan "Doc" Scott, Ph.D., D.D., Economist, Theologian and Financial Consultant (Tr.10537-10538). As a Financial Consultant Scott has sold a wide variety of products including: solar energy devices, water machines, and other tax shelters; rare coins; oil and gas investments, Kent Maerki's antiquities; and real estate limited partnerships (Tr.10556-10561, 10566-10567, 10580; Findings 18-19, 601, and Footnotes 11-12 *supra.*).

636. Doc Scott was born on September 21, 1929. He graduated from high school in 1947, entered military service and was stationed overseas (Tr.10529). In 1948, he became "General MacArthur's youngest economics investigator, Thank God, and he was a very good third dad to me." (Tr.10530).

637. Scott was released from active duty in 1950, attended college in Minnesota, (Tr.10530) and graduated in 1953 with a BS degree "with honors, thank God, nothing special." (Tr.10531). In 1969, according to Scott, he received a doctorate in psychology from the Neotarian Fellowship in Kansas City, Missouri (Tr.10532). He received two additional doctorates from the Neotarian Fellowship in 1972 and 1973 in comparative theology and philosophy. He says the doctorate of philosophy program was heavy in economics. He currently is working on a fourth doctorate with the Neotarian Fellowship, in common law (Tr.10533-10534). But he has never attended classes at the fellowship (Tr.10614).

638. Doc Scott says he was ordained as a minister by the Church of the Holy Light in Pittsburgh, Pennsylvania in 1972. That organization is related to the Eterine Fellowship (Tr.10823-10824). He has no church and does not do weddings (Tr.10536). He does visit various churches and teach, however (Tr.10536).

639. Scott first got involved in Cellular in 1984 when he fell ". . .egg ,wild in love with" it (Tr.10588). He says someone at American National Cellular offered him the position of national sales manager, but he turned it down. He never met Joseph Steingold from ANC; Steingold went to jail (Tr.10589-10590).

640. Doc Scott met Kent Maerki "at the meeting when I fell in love with cellular in either February or March 1984" (Tr.10564).[139] He had heard of Maerki a couple of years before and believed that "his product or products, whatever it would be, fit us" (Tr.10564). He has a "tremendous affinity for" Maerki's antiquities product; Scott marketed antiquities, and "still would today," even though people who invested in them did not do very well (Tr.10566). It was Maerki who hired Doc Scott as a TCC regional manager (Tr.2209).[140] Scott still considers Maerki to be a "dear, dear friend" (Tr.10580).

641. As TCC regional manager Doc Scott had TCC brokers working under him as district managers: Phil Kosh; Bob Holiday; Jules Dion; and Robert Chapman (See Finding 633(5) *supra.*; Tr.10619, 10780, 10970). Scott started selling for TCC during the MSA program.

642. Several of Alpha's partners were Scott MSA clients. In fact three of the four Alpha partners who testified, Mildred Williams (Finding 634(18) *supra.*), Robert Chapman (Finding 634(5) *supra.*), and Clyde Bridgeman (Finding 634(2) *supra.*) purchased MSA investments from Scott and participated in the MSA alliance program. Bob Chapman won interests in two out of four markets, Atlantic City, and Santa Rosa, California. He sold those interests (Tr.10974, 11164).

643. Clyde Bridgemen won five out of six MSA applications purchased through Scott via alliances (Tr.11451). He sold his Atlantic City interest and still holds the other four. (Tr.11452-11453). Mildred Williams, via alliance agreements, won seven out of ten MSA applications she purchased from Scott. She sold five of her interests and received stock for the other two. Some of her sales were with Doc Scott's help (Tr.10366-10367).[141]

644. As early as December 1986, Scott started selling TCC RSA applications. In 1987 Mildred Williams bought 19 RSA applications from Doc Scott (Tr.10367, 10380-10381, 10625; AALA/CFL Ex.394). Scott paid her finder fees for referring clients to him (Tr.10392, 10636). She invested in RSAs because she had been successful in the MSA alliances (Tr.10386).

645. Robert Chapman bought RSA applications from Scott (Tr.10987). Doc Scott paid Chapman finder fees for people he referred to Scott (Tr.10973-10974). At the time he was doing RSA business with Scott, Chapman was aware of the FTC proceeding (Tr.10981-10982; Findings 21-24 *supra.*).

646. Mary Lois Olliver (Finding 632(10) *supra.*) bought RSA applications from Doc Scott in 1987. She also received finders fees from Scott for referrals (Tr.10636, 11311, 11397). Clyde Bridgemen purchased RSA applications from Doc Scott. Scott paid him finders fees (Tr.11452-11453, 11463).

647. On May 27, 1987, Doc Scott hosted a TCC cellular seminar in the El Camino Country Club in Oceanside, California. He sent advanced notices of the seminar to both his clients and his brokers.[142] Many attended. Phil Kosh, Mildred Williams, Mary Lois Oliver (Finding 632(10) *supra.*), Chapman and Jules Dion attended that seminar. Doc Scott taped the seminar and sent it to those who didn't attend (CCB Ex.267, last page; Tr.10387, 10627-10629, 10635, 10987-10987).

648. TCC owner Nicholas Wilson spoke at that seminar. He told the audience that although the FCC was proposing to prohibit alliances, TCC would implement "a business plan" that would do the same things as alliances (AALA/CFL Ex269; Finding 28-38 *supra.*; Tr.10630). Wilson further stated that his business plan was being developed in response to Doc and his clients and the field force (AALA/CFL 269 at 9; Tr.10633).

649. In May 1988, Doc Scott had a telephone conversation with Greg Neely which he taped. There Neely described the linked partnership program and its two steps (AALA/CFL Ex.4, p.7, p.10). Doc Scott then sent his clients and brokers a tape of his conversation with Neely, TCC's 31 page promotional booklet and an update. In the update he referred to the "linked partnership" concept and told his clients to study the concept carefully because ". . .a $10,000 one-time investment" could ". . .produce $50,000 and up per year forever potentially. . ." Scott described the linked partnership concept as a "Win-Win plan." (Tr.10646).

650. Mildred Williams received Doc Scott's materials. She read all of Doc Scott's letters (See Footnote 140 *supra.*; Tr.10396, 10399, 10473. Bob Chapman also received Scott's items. He listened to the tape. And he remembers Neely saying there would be a contract (CCB Ex.15; Tr.10995, 10999-11000). Clyde Bridgman also listened to the tape (Tr.10989-10992, 11510).

651. Neely also sent Doc Scott a copy of the May 12, 1988 letter he (Neely) had sent to Edward J. Massey of EJM (See Findings 408-410 *supra.*). Scott was impressed with this letter (Tr.10642). In the Massey letter Neely indicates that the FCC has prohibited alliances. Then he says "to help stack the odds in our favor we have come up with a two-tier program." Neely enclosed a diagram which depicts the "linked partnership concept." When Mildred Williams read the Massey letter, she understood that the diagram meant linked partnerships. (CCB Ex.251; Tr.10401, 10641). On June 6, 1988, Scott sent out another update promoting ". . .a WIN-WIN" for all (CCB Ex.252).

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[139] Doc Scott falls ". . .in love" easily. He "fell absolutely in love" with oil and gas investments (Tr.10567). "I fell in love with solar [energy]. I still love it" (Tr.10556).

[140] TCC never did a due diligence on Doc Scott (Tr.2209-2210). After the FTC consent decree was issued, TCC did not make any changes in supervising Scott's activities (Tr.2209-2211).

[141] Doc Scott was Mildred Williams' financial planner from early 1984 until 1989 (Tr.10364-10365).

[142] Doc Scott follows the practice of keeping his clients advised and up-to-date through the medium of newsletters and memos.

652. Doc Scott hosted another TCC seminar at Oceanside, California on June 7, 1988. There Kent Maerki discussed forming partnerships and Doc Scott explained the linking concept. People who attended were given copies of promotional literature called "The Green Book." The Green Book contained a copy of a sample partnership agreement. (AALA/CFL Ex.274; Tr.10401, 10416, 10657-10658, 11001, 11005-11006, 11308, 11461, 11507).

653. Among the Alpha participants who attended the June 7th seminar were Phil Kosh,[143] Robert Chapman, Mary Lois Oliver and Mildred Williams. They participated in the seminar discussion. They all understood that alliances were out and linked partnerships were in. (CCB Ex.267, AALA/CFL Ex.274; Tr.9135-9137, 10659-10660, 11000-11005, 11136-11137, 11307-11310).

654. Alpha investor Clyde Bridgeman (Finding 632(2) *supra.*) lives in Peoria, Illinois (Buckhead Ex.39, p.4). So he did not attend the June 7th seminar. However, he received and listened to the tapes from the seminars, along with TCC's promotional booklet. The partnership idea sounded good to Bridgeman. He believed revenue sharing was the same as allowances. (Tr.11455, 11458, 11460, 11496-11497, 11511).

655. Immediately after the June 7, 1988 seminar, Doc Scott sent out ". . .Guidelines toward Winning Cellular Licenses Together. . ." There Scott made another pitch for partnership linking as opposed to going 'solo'. He characterized linking as a prudent approach; he detailed the instructions for joining partnerships and filing them with the FCC; and he talked of "Linking" with the other Partnerships contractually ". . .to pave the way toward the mind-boggling 'Win-Win' potentials to benefit all partners. . ." (CCB Ex.182, 204, 253; Tr.10413, 11000, 11007). Less than a week later Scott sent out detailed instructions on how to join a partnership (CCB Ex.254; Tr.10664).

656. The partnerships were put together in June 1988. Doc Scott placed his clients', and some of his brokers in Alpha. He called Neely and St.James and asked if there were any orphans because he needed individuals for another one of his partnerships, Bravo Cellular *supra.* They said there were none. So Scott created the NASA Trust (whose beneficiaries are his children), and placed it in Bravo along with Scott's extra clients. It was Doc Scott who named the partnerships "Alpha" and "Bravo". He dated the partnership agreement June 1, 1988 (Alpha Ex.1, ATT B; Tr.10619, 10665-10667; also see Findings 600-602, 608). Mildred Williams signed the Alpha partnership on June 27, 1988 (Tr.10415).

657. Shortly thereafter, on July 7, 1988, Scott sent an update to his "Cellular RSA Partners." There he gave them the names of the partnership they were in; he told them that their manager would be Phil Kosh; he told them that Alpha's co-signatory would be Mildred Williams; and he told them that "linking is to be done by third party specialists." To Doc this meant law firms. He explained again that with linking the winning partner would share 50% of the profits (CCB Ex.255; Alpha Ex.1, p.63; Tr.9250, 10418, 10668, 10674).

658. Mildred Williams, Bob Chapman, and Mary Lois Oliver all read Doc's July 7, 1988 letter (Tr.10418, 11011-11013, 11327-11328). Clyde Bridgeman was aware that Kosh was to be Alpha's manager (Tr.11464). Mildred Williams was aware that Alpha would be linking with other partnerships, and when Doc Scott asked her to be signing partner, she agreed (Tr.10418, 10669).

659. TCC sent Alpha's applications and other partnership documents to Phil Kosh.[144] He would contact Mildred Williams or have Doc Scott contact her, and Mildred was supposed to sign the applications (Tr.10420, 10620). She only did so on one occasion (10420, 10480). Mrs. Williams didn't sign the $200 FCC filing fee checks; Phil Kosh signed them. Likewise, when Mrs. Lois Oliver, was Alpha's signing partner, she didn't sign the filing fee checks. She never had signature authority on the Alpha bank account. (Tr.11389). During July 1988, Mrs. Williams took a vacation, and was not available to sign the Alpha RSA applications (Tr.10420-10421). So Doc Scott asked Mary Lois Oliver to assume responsibility for signing the applications to be filed with the FCC (Tr.10421, 11330).

660. On August 15, 1988, Mrs Oliver signed Alpha's Indiana 8 (Brown) RSA application. That application was filed on September 23, 1988 (CCB Ex.232-A). She signed Alpha's Ohio 2 (Sandusky) application on October 31, 1988. That application was filed on January 16, 1989 (Buckhead 48).[145]

661. At the time she signed Alpha's RSA applications, Mary Lois Oliver certified that each application was ". . .complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules."

662. It developed at the hearing, she had absolutely no basis for so certifying. At the time Mary Lois Oliver so certified, she wasn't familiar with the Commission's rules. She just signed what she was sent and returned it (Tr.11432). At the time she certified she did not see an exhibit showing Alpha's financial qualifications; she did not have page 3 of Buckhead Ex.48 in front of her when she signed; and there were no exhibits or application contents following the signature page when she signed. TCC just sent her what she needed and she returned it.[146] (Tr.11435-11447; CCB-232A).

663. At the time she signed Alpha's RSA applications, Mrs. Oliver further certified that ". . .there are no agreements or understandings other than those specified in the application which provide that someone other then the applicant shall have an indirect or direct ownership interest."

664. On September 19 and 20, 1988 Doc Scott called his clients in both Alpha and Bravo and got their vote on the MCRSA. He taped the vote portion of these conversations.

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[143] Phil Kosh was the Managing General Partner for Bravo Cellular and, for a time, was Alpha's Initial Manager, but never a partner.

[144] Kosh was paid for his management functions. He received $7400 for Alpha, and $7400 for Bravo (Tr.9247-9248, 10672-10673).

[145] The record does not show how many of Alpha's 428 RSA applications were signed by Mildred Williams and how many were signed by Mary Lois Oliver. But its not that important since both were appointed by TCC Broker, Doc Scott.

[146] Mrs. Oliver followed the same procedure with other documents she signed. For example, TCC asked her to sign a $1,500,000 Replacement Note for Alpha. She says she had "no concept of what it was. I was just told to sign it, and I did, as the signing partner for Alpha Cellular" (CCB Ex.240; Tr.11338).

Doc Scott asked:

> "Let's see it is September 19, 1988 and Millie Williams is on the phone with Alpha Cellular and Millie, we need your vote, please either yes or no regarding this Mutual Contingent Risk Sharing Agreement. . .What is your vote please?"

Mildred Williams answered:

> "My vote is yes."

665. This same conversation took place with the other partners Doc Scott called (Tr.10679). Chapman voted yes, he knew the vote was needed before the September 23, 1988 lotteries (Tr.11017-11018, 11161). Mary L. Oliver remembers voting yes for the MCRSA (Tr.11336-11337). Clyde Bridgeman voted yes (Tr.11465). During these phone conversations Scott specifically referred to the MCRSA by its title, and he didn't know of anyone in Alpha who did not understand the linking concept (Tr.10680, 10686).

666. Doc Scott participated in the now infamous September 20, 1988, West Coast Conference call (See Finding 611 and the citations listed there). In fact Scott taped this conference call. He had a draft of the MCRSA in his possession before the call. Alpha was represented in the call by its Manager, Phil Kosh (AALA/CFL Ex.28; Tr.9175, 10645-10646, 10687-10690, 10847). After the telephone conference, Bob Holiday, Phil Kosh and Doc Scott talked about the MCRSA (Tr.9292, 10687).

667. On September 22, 1988, Phil Kosh signed the MCRSA Execution Document on behalf of the Alpha partnership (AALA/CFL Ex.256, at 34, 16; Tr.9172-9173). At the time he signed Kosh knew that Doc Scott had approval from over two-thirds of the Alpha partnership by voice vote (Tr.9283). Kosh doesn't recall who told him to sign for the Alpha partnership on line 5 of the Execution Document; nor does he recall who told him to have his signature notarized (Tr.9172, 9289, 9311). At the time he signed, Kosh was aware of the urgency of getting the documents signed before the first lotteries; he knew he was signing an important document; and he believed he kept a copy of the Alpha signed it (Tr.9309-9310, 9317).

668. Kosh sent the original signature page to TCC. A short time later someone at TCC telephoned him and told him that (since he held no Alpha partnership equity) he could not sign for Alpha Cellular (Tr.9183-9184). So he tried unsuccessfully to obtain the signature of an Alpha partner on the Execution Document, namely Lois Oliver's. Unable to contact her, he asked Doc Scott for help. Scott said he'd take care of it, and a couple of days later Scott called Kosh back and said he'd taken care of getting the signature on the MCRSA Execution Document (Tr.9183-9184, 9322, 93687).

669. On October 6, 1988, Doc Scott telephoned and taped a call he had with Mildred Williams (AALA/CFL Ex.280; Tr.10424, 10700). He asked Ms. Williams to come to his home the following day to place an "authorized signature" on the MCRSA. She agreed to do so (AALA/CFL Ex.280, pp.12-13; Tr.10422-10426). On October 7, 1988, Ms. Williams went to Scott's house, signed the Execution Document of the Risk-Sharing Agreement, and initialed a change made by Scott in the Execution Document (Tr.10426, 10644, 10701-10702, 10714, 10740, 10742, 10763, 10770). Doc Scott and his wife, Frances, witnessed Mildred Williams signature.

670. Later, after Alpha had won the Indiana 8 (Brown) RSA (See *infra.* and Finding 660 *supra.*), the Alpha partnership embarked on a campaign to distance themselves from TCC and Doc Scott; i.e., they took the position that Alpha was not and never had been a party to the Agreement (See e.g. Buckhead Ex.40).

671. In furtherance of that campaign, Mildred Williams said she didn't remember signing the MCRSA, and hinted that both her signature and initials had been forged.[147] As a consequence, and as a pretrial matter, a handwriting expert was commissioned jointly by Alpha and AALA/CFL to render an opinion about the authenticity of the signature and initials on the MCRSA.[148] The handwriting expert determined that the signature and the initials on the 14 party West Coast Mutual Risk Sharing Agreement were Mildred Williams (AALA/CFL Ex.367). Consequently, Mildred Williams is *now* certain that her signature on the Execution Document is genuine, and that the initials on the first page of the Execution Document are hers (CCB Ex.264, AALA/CFL Ex.367; Tr.10492-10493).

672. On October 7, 1988, when she was at Doc Scott's house, Mildred Williams also executed a written ballot in favor of the MCRSA (CCB Ex.267 at Scott 5). However, the ballot is dated 9/19/88, the date she had voted in favor of the MCRSA in a telephone conversation with Scott (See Findings 664-665 *supra.*). The printing on the ballot is Doc Scott's (CCB Ex.173 at TSJ 0144, Tr.10426-10428, 10440, 10495, 10709). Mrs. Williams clearly remembers signing the Alpha ballot; and she understood she was voting yes for the MCRSA when she signed (Alpha Ex.2, p.14; Tr.10427, 10434). Doc and Frances Scott witnessed Mrs. William's vote (Tr.10430).

673. After he obtained Mildred Williams' signature on the Execution Document, Scott set out to implement the Tye St.James ballot ratification procedure for Alpha. (See e.g. Finding 616 *supra.*). He sent a letter to the Alpha partners informing them that Alpha had entered into a risk-sharing agreement. In his October 10, 1988 letter he stated: "14 of our RSA Cellular groups are now contractually LINKED as we all had planned on and hoped for. Phil and other key friends were very helpful in accomplishing this for you."

674. With the October 10, 1988 letter Scott enclosed written ballots designed to confirm the telephone votes cast in favor of the risk-sharing agreement (See Findings 664-665 *supra;* CCB Ex.187, CCB Ex.208; Tr.10677-10678, 11020). The ballot read in part: ". . .with knowledge of the risks and rewards of the Mutual Contingent Revenue Sharing Agreement for fourteen partnerships. . .I do hereby vote as follows: . . ." (CCB Ex.173). Through the telephone and the written ballots, 100% of the Alpha partners ap-

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[147] The forgery rumor understandably caused Doc Scott great consternation, since he had sworn unequivocally that the signature and initials on the MCRSA were Mildred Williams'. So the rumors were indirectly suggesting that Scott was at best a liar and at worst a forger. (See e.g. CCB Ex.264; also see CCB Ex.197).

[148] Common Carrier Bureau counsel, at the Trial Judge's suggestion, participated in the authentication exercise.

proved the MCRSA (CCB Ex.171, CCB EX.218; Tr.10436, 10500, 10697, 11021-11023, 11094, 11340-11341, 11394-11395, 11466-11468).

675. The following day, October 11, 1988, Alpha manager Phil Kosh confirmed that Alpha was a participant in the Risk Sharing Agreement, and stated that ". . .two of Alpha's linked partners have won licenses in California." And he closed by saying: "From now on we're confident that (dare we hope) ALL of our newsletters will carry good news! As ALPHA members you already have a lot to be thankful for" (CCB Ex.219, CCB Ex.257, CCB EX.248; Tr.9192-9193, 10437, 10497-10498, 11160, 11342, 11473).

676. The following month, on November 10, 1988, Kosh sent out another update. It was entitled "Wonderful News!!!" There he said "We have another winner! [Arizona 1] . . .we've won 3 out of 24 areas! That's a truly amazing average." (CCB Ex.258, Tr.9193, 11024). Again on January 16, 1989, Kosh notified the Alpha partners that: ". . .As the result of the most recent FCC drawing we, with our linked partners, have won 6 areas. The three new ones are Utah 2, Oregon 1, and Idaho 1. . ." (CCB Ex.189; Tr.9194, 10441).

677. In May 1989, the West Coast partnerships scheme not to disclose the existence of the MCRSA to the FCC *et. al.* started coming unglued. And Doc Scott sent a memo to the Alpha partners captioned "CONFIDENTIAL. . .re. 'sharing'. . .CONFIDENTIAL." There Doc Scott said in part (CCB BUR Ex.194):

> "One of our fine members has been BLABBING to unauthorized ears about our 'sharing' concept. . .which is a quick way for all concerned to LOSE! Let's *ALL BUTTON THE LIP* about this, as mentioned before. . .
>
> . . .So let's ALL AGREE, please, that *UNTIL YOU START RECEIVING THIS INCOME*, NO BLABS. So now with this thoroughly understood, please *DESTROY* this part, as in INTELLIGENCE. . ."

678. On May 25, 1989, Alpha won the Indiana 8 (Brown) RSA lottery, and became the tentative selectee for that market (CCB Ex.311). Scott sent a letter to the Alpha partners congratulating them on their win and again reminding them of the Risk Sharing Agreement (CCB Exs.193, 207, 242; Tr.10447, 10502, 11025, 11346-11347). After this meeting Scott was *asked* for and provided a list of Alpha partners and their addresses (CCB Ex.223; Tr.11477).[149]

679. On July 21, 1989, Doc Scott sent a memo to "All (18) Alpha Cellular Co-Owners" re "Nominations for Project Coordinator." There he indicated that, having won the Indiana 8 RSA, Alpha was going to need a Project Coordinator, and he openly made a pitch for that position (Alpha Ex.1, p.188). And, although for awhile it looked like he was going to be selected, he was ultimately passed over (Alpha Ex.p.19; CCB Ex.200; Tr.10453-10454, 10896-10897, 11029, 11348, 11477-11478, 11539). In that same letter Scott appointed Alpha's initial steering committee: Lois Oliver, Clyde Bridgeman and Mildred Williams.

680. The Alpha partners met on August 7, 1989 to discuss or act on the partnership's future. They discussed the fact that no one had seen the MCRSA (Tr.10457, 11030).[150] They elected Bob Chapman,[151] partnership coordinator, and Clyde Bridgeman his assistant (*in absentia*). They decided to send Chapman and Bridgeman to the winner's conference at the Westfields Conference Center near Dulles Airport in Northern Virginia on August 25-27, 1989 (Tr.10457-10458, 11030-11032, 11036-11037, 11349, 11480).

681. Bridgeman and Chapman attended the Westfields Conference. There they learned something that was to alter the course of future Alpha partnership contentions. There they learned that the Indiana 8 RSA they had won was a good market; that it was one of the top 50 RSA markets and that it could be worth as much as $30 million (Tr.8979, 11170, 11178, 11547). However, both Chapman and Bridgeman were distressed when they realized that Alpha would be obliged to share this cellular plum if they sold the system (Tr.8980-8981).

682. Both during the Westfields Conference and immediately afterward Chapman and Bridgeman talked to several TCC executives. They talked to Greg Neely about "risk sharing, how well the West Coast had been doing and how many pops under the risk sharing various entities had won." (Tr.1853, 2251). Neely was aware that Alpha had signed the MCRSA, and it appeared to him, that Chapman and Bridgeman knew they were part of the MCRSA (Tr.1854, 1894, and 2095).

683. Bridgeman and Chapman talked with TCC attorney Pendleton Waugh. It seemed to Waugh that Chapman and Bridgeman considered Alpha part of risk sharing.[152] But they indicated to Waugh that they wanted out of risk sharing because they had won a market more valuable than the other West Coast participants, and they didn't want to share with others (CCB Ex.279; Tr.4176-4178). Bridgeman and Chapman told Waugh that if they shared they would be giving up more in distributions than they would be getting back (Tr.4294). After the conference Chapman contacted Waugh and indicated that he didn't want to participate in the agreement (Tr.4181).

684. During the Westfield conference and subsequently Chapman and Bridgeman also had conversations with TCC's Tye St.James. During one of these conversations, Chapman rhetorically asked St.James:

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[149] What was wrong with the partnership list Phil Kosh sent out on August 12, 1988? (See CCB Ex.163).

[150] Mildred Williams claims that she had not seen the MCRSA; that she, their son Derek, and her friend Daisy Kozak had asked Doc Scott for copies of the MCRSA but he said it was not available (Tr.10450, 10455, 10759-10760). But that's not what Doc Scott says. Scott says that when she signed the MCRSA on October 7, 1988 (Finding 669 *supra.*) Mildred Williams had the entire MCRSA in front of her (including the Terms and Conditions), and that he and Millie discussed the MCRSA at the time she signed it (Tr.10644, 10763, 10770). Doc Scott's testimony on this point will be credited.

[151] Robert Chapman is another of the many "financial planners" that have come to the front in this proceeding. He has done business with Doc Scott in the past (See Tr.10967-10968, 10977-10979; Findings 642-643 *supra.*). So, while Alpha may have shucked Scott, Chapman doesn't appear to be any ethical bargain.

[152] Neither Bridgeman nor Chapman gave Waugh any indication that they thought risk sharing was still only a proposal (Tr.4294).

"What happens when we get that construction permit in our hot little hands, . . .and then the FCC finds out about our linked partnerships." During the same conversation St.James told Chapman that he shouldn't describe the MCRSA as a linked agreement. Chapman shot back, "[w]hat would you like me to call it then?" St.James responded "revenue sharing." Chapman was not happy with what St.James was telling him about the MCRSA (Alpha Ex.1, pp.216-217, 224-225, 238-239; Tr.11039-11041, 11047-11052, 11058-11059, 11071, 11481).

685. Alpha held their next partnership meeting on September 10, 1989. There Clyde Bridgeman and Bob Chapman reported on what he had learned at Westfield and immediately thereafter. Either Bridgeman or Chapman said, "If you own three percent [of Alpha] now you are a millionaire." There was a lengthy discussion about the scope of the MCRSA and what Alpha was bound by. The partnership agreed to take the position that they had agreed to share "net profit" but not "capital gains" (CCB EX.249; Tr.10511-10512, 11184-11188, 11390, 11391, 11398, 11401, 11404-11409, 11411-11412, 11416-11419).

686. On October 1, 1989, Chapman talked with Dean Mosely the representative of a cellular system neighboring Alpha's. Mosely was interested in acting as Alpha's broker. During the course of their conversation, Chapman said to Mosely that there ". . .could be this agreement." Mosely said that such an Agreement surely violates the Commission's Rules, and suggested that they talk with Mosely's counsel, Alan Naftalin (Tr.11075, 11079-11080). In a subsequent call on October 2, 1989, between Mosely, Naftalin and Chapman, Chapman said that they (Alpha) had to get out of the MCRSA (Tr.11199).

687. Meanwhile on October 4, 1989, David Kaufman of Brown, Finn and Neitert sent Alpha's Lois Oliver a letter recommending that the MCRSA be disclosed to the FCC. Chapman also spoke with Kaufman. Chapman expressed his opinion that the Agreement may be illegal and Alpha, didn't have to be part of it. Every time he talked to Chapman, Kaufman got the impression that Chapman's number one agenda item was to get out of the arrangement (Alpha Ex.1, p.373; Alpha Ex.3, p.36; Tr.11981-11982, 12092, 12232).

688. On October 30, 1989, the FCC granted Alpha a Construction Permit for the Indiana 8 (Brown) RSA. The same day Doc Scott sent the Alpha partners a letter updating the revenue-sharing activity and reiterating ". . .What a great blessing our 'sharing' can be for all." Scott also announced that ". . .Another rumor has it that a big winner wants to fudge on the contract; which could result in expensive and disastrous results for the fudger(s), so I'm told" (CC Bur 196).[153]

689. On November 12, 1989, the Alpha partnership met again. A copy of the MCRSA was available, and they discussed it word for word. They were told, *inter alia* that they could lose up to $30 million if they were involved in the MCRSA. They discussed the validity and authority of Mildred Williams' signature. John Herron[154] then moved that they withdraw from the risk sharing agreement and proceed on an independent course. Louise Robinson (Finding 634(14) *supra.*) seconded the motion, and the motion was carried. (CCB ex.198; Tr.11383-11384, 11541). At that same meeting Robert Chapman replaced Phil Kosh as Alpha's manager, and arrangements were made to hire Alan Naftalin of Koteen and Naftalin as Alpha's attorney. (CC Bur 198; Tr.10969, 11101, 11125).

690. On November 16, 1989, Doc Scott, in an effort ". . .to stop a stampede. . .", sent a letter to ". . .Present and former ALPHA friends." There, among other things, he noted that ". . .As ALPHA's *Millie will remember*, the only set (the MCRSA) that we had was in front of her in its entirety when she properly signed as ALPHA's signatory (CCB Ex.197; Tr.10467-10468, 10763, 11257).

691. It was about this time that the members of the West Coast MCRSA filed rescission documents. See e.g. Findings 443, 164, 495, 512, 551, 584, 619 *supra.* Alpha did not do so. Instead on November 28, 1989, Alpha's counsel sent the FCC a letter. There counsel stated in part (Buckhead Ex.40):

". . .

"It has come to our attention that Alpha has been identified as a party to a Mutual Contingent Risk-Sharing Agreement (the Agreement) with thirteen other cellular applicants or permittees. A copy of the Agreement was filed with the Commission by Signal Cellular Communications on October 31, 1989, *and it purports to bear the signature of one of Alpha's general partners, on behalf of Alpha* . . . (underlining added)

Following our recent retention as counsel for Alpha, we have at Alpha's request inquired into the circumstances surrounding its alleged involvement in The Agreement. This will advise the Commission that based on the advice we have given Alpha following our inquiry, Alpha hereby informs the Commission that *Alpha is not and never has been a party to the Agreement.* (underlining added) . . ."

692. On December 13, 1989, Alpha won the Ohio 2 (Sandusky) RSA lottery, and became the tentative selectee for that market.

693. Subsequently Phil Kosh heard rumors that Mildred William's (Alpha's signing partner) signature had been forged. And the rumor was that either he or Doc Scott had done the forging. So he contacted Doc Scott. Then Doc Scott sent Rick Brown (Brown, Finn and Neitert) a letter on March 30, 1990 (CCB Ex.264, Tr.10721-10722); Scott executed an affidavit on April 16, 1990 (Tr.10794; AALA/CFL Ex.295). He sent another letter to Rick Brown (AALA/CFL Ex.294; Tr.10820) on May 7, 1990. Again on June 11, 1990 Scott sent still another letter to Rick Brown in which he enclosed his affidavit (Tr.10767-10769). At Kosh's suggestion Scott wrote Larry Solomon (Bravo's counsel) on July 27, 1991. There he enclosed the tape of his October 6, 1988 phone conversation with Millie Williams (See CCB Ex.266; Tr.9210; and Finding 669 *supra.*) Scott sent Solomon another letter on August 6, 1991 regarding the forgery allegations. (CCB Ex.267).

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[153] By this time Doc Scott had already sent a letter to David Kaufman enclosing the Alpha ballots (Tr.10755; Finding 681-682 *supra.*)

[154] See Finding 634 *supra.* There is no John Herron listed as an Alpha partner, but John Herron attended the meeting as a proxy for Walter Butts (Finding 634(4) *supra.*).

694. As previously noted (Findings 670-671 *supra.*), at the outset of the hearing one of the questions that we put to rest was whose signature appeared for Alpha on the MCRSA. The signature in question was submitted to a handwriting expert along with appropriate specimens. The handwriting expert determined that the signature and the initials on the West Coast MCRSA was indeed Millie Williams. Even Alpha's counsel is now satisfied that she signed the MCRSA on Alpha's behalf.[155]

695. *Intermediate Findings.* Alpha's CP for the Indiana 8 (Brown) RSA will be revoked, and their application for the Ohio 2 (Sandusky) RSA will be denied. They lack the character qualifications to be a Commission licensee. They have wilfully and deliberately entered into partial settlement agreements with 13 other nonwireline RSA applicants in violation of 47 CFR 22.33; they have amassed multiple ownership interests in pending RSA applications in violation of 47 CFR 22.921; and they have purposely and indirectly transferred interests in pending RSA applications in violation of 47 CFR 22.922.

696. Equally important, Alpha has falsely certified both their Indiana 8 (Brown) RSA and their Ohio 2 (Sandusky) applications in at least two places. These false certification violate 47 CFR 22.923(b)(7). On August 15, 1988 and October 31, 1988, when she signed those applications, Mary Lois Oliver certified that each was ". . .complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules." Those certifications proved false. She knew that she wasn't signing a complete application; she wasn't even remotely familiar with the Commission; and she was aware that all of the requisite information wasn't before her. She signed what TCC sent her and returned it. Those 47 CFR 22.923(b)(7) falsifications (along with the other 426) form an independent and separate reason for revoking the Indiana 8 RSA CP and denying the Ohio 2 RSA application.

697. On August 15, 1988 and October 31, 1988, when she signed those applications, Mary Lois Oliver represented ". . .that there are no agreements or understandings other than those specified in this application which provide that someone other than the applicant shall have an indirect or direct ownership interest." Technically she was correct on August 15, 1988 when she signed the Indiana 8 application. But Mrs. Oliver knew or should have known that Alpha was about to become a participant in a multi-lateral risk-sharing agreement. And on October 31, 1988, when she signed the Ohio 2 RSA application, she surely knew she had orally voted in favor of the MCRSA (See Findings 664-665 *supra.*); that she had executed a written ballot ratifying the MCRSA (Findings 673-674 *supra.*); and that two of Alpha's linked partners had already won in California (Finding 675 *supra.*). The Ohio 2 October 31, 1988 certification is also a false certification within the meaning of 47 CFR 22.923(b)(7), and is not the type of conduct the Commission has the right to expect of its applicants and permittees.

698. Next, Alpha has deliberately and egregiously violated 47 CFR 1.65. Alpha entered into the 14-party MCRSA on or about September 22, 1988; and they didn't report the agreement's existence to the FCC until November 28, 1989. And even then Alpha asserted that it ". . .is not and never has been a party to The Agreement." Alpha was well aware they were concealing decisionally significant information from the FCC. During a conversation between Alpha's Bob Chapman and TCC broker Tye St.James, Chapman pointedly ask St.James (Finding 684 *supra.*):

> "What happens when we get that construction permit in our hot little hands. . .and then the FCC finds out about our linked partnerships."

Such deceit shouldn't be rewarded. This 47 CFR 1.65 violation is mammoth, and did grave injury to the FCC's RSA allocation processes.

699. Unlike the other applicants and licensees in this case, Alpha has elected to argue that it is not now and never has been a party to the Mutual Contingent Risk Sharing Agreement. So it's position (inaccurate as it is) is that it has violated no Commission rules or policies, and that it has made no misrepresentations. Stated another way, Alpha has made no effort to offer any mitigating circumstances.

700. In summary (Findings 634-699 *supra.*) there are upwards of eight basic disqualifying reasons for revoking Alpha's Indiana 8 RSA application, and denying their Ohio 2 RSA application.

Conclusions of Law

1. This Initial Decision is the compulsory but unfortunate chronicle of a less-than-scrupulous RSA cellular application vendor, The Cellular Corporation (TCC). Using artful and disingenuous brokers (Alan Kane, Doc Scott etc.) TCC *presold* over 11,500 RSA cellular applications to some 341 investors.[156] They sold those applications under the fallacious representation that the buyer would be able to enter into post-filing, pre-lottery partial settlements called "alliances." TCC and their brokers even went so far as to represent that even if (as rumored) the FCC did away with alliances (which had previously been allowed during the MSA cellular allocation process), TCC would implement a "business plan," a plan that would achieve the *same results* as alliances.

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[155] AALA/CFL argues that Mrs. Williams and Alpha's counsel have actually known since April 2, 1990 that the MCRSA signature in question was Millie Williams. (See AALA/CFL Findings 95-96 *supra)*, but never told anybody. Although there is merit to that argument, what happened on March 13-14, 1990 was not conclusive. Perhaps it was purposely left non-conclusive but that's another matter.

[156] The 21 captioned applicants and licensees are made up of 341 investors. But many of those investors are themselves partnerships made up of numerous individuals. Moreover, some of the signatories to both the East Coast and West Coast MCRSAs didn't win any lotteries. So they were not made parties to the proceeding. But (as signatories to the risk-sharing agreement) they will be affected by the results of this decision. In addition 21st Century Cellular and Edison Cellular are no longer parties to this proceeding. Also TCC and their brokers *postsold* RSA cellular applications. All in all the number of individual investors impacted by TCC's premature and fallacious representations probably exceeds 1000.

2. Shortly thereafter the FCC did conclude that alliances and the results stemming from such alliances substantially hindered the proper processing and appropriate allocation of cellular applications. So the Commission passed a new set of rules, rules that did away with alliances and partial settlements.

3. TCC and their brokers were then faced with the prospect of returning the presold funds to their many RSA investors. Neither TCC's president, Greg Neely, nor TCC's brokers wanted to return those monies. Moreover, the record reflects that since substantial amounts of money were involved, neither TCC nor many of their brokers had the financial wherewithal to reimburse their individual investors. So, with full knowledge of the many complexities and risks involved, they opted to develop and implement a "business plan" designed to achieve the same results as alliances. The plan they implemented (Mutual Contingent Risk Sharing Agreements - MCRSAs) embodied partial settlements and required the filing of a flood of speculative applications (428 per applicant or licensee). These were the very allocation abuses the Commission was bent on eliminating. See Findings 12-14 *supra.*).

4. Stated simply, rather than return the money to their investor-clients, TCC and their brokers embarked on an elaborate plan to circumvent the Commission's newly developed RSA rules against alliances and partial settlements; i.e., 47 CFR 22.33, 47 CFR 22.921, 47 CFR 22.922, 47 CFR 22.923(b)(7). They embarked on this plan deliberately. They embarked on this plan wilfully.

5. Why they believed they could pull off such a massive scam remains a mystery. Perhaps it was because it was such a huge undertaking they thought the Commission would back off from its newly promulgated RSA rules. In any event TCC realized that an essential link in their circumvention plan involved concealing the existence of the MCRSAs from the FCC. TCC's then attorney, William Franklin, had advised them that there was no need for these partnerships to report to the FCC that they were a signatory to a multilateral partial settlement agreement. He even estimated that there was a 50% chance that the risk sharing agreements would never be called to the FCC's attention. Even if they were, said Franklin, the chances were very good the Commission would do nothing about it.[157]

6. Franklin's estimate proved faulty and his advice bad. Given the size and complexity of the Commission's RSA cellular allocation effort, given the number of participants in that effort (including other competing application vendors), and given the large number of signatories to the multilateral partial settlement agreements, it was sheer folly for TCC *et. al.* to believe that the existence of such agreements could remain a secret for any length of time.

7. But for well over a year TCC and their brokers did not disclose the existence of the MCRSAs to the FCC. And it was only under pressure from the Washington, D.C. law firm of Brown, Finn, and Neitert, that TCC's President Greg Neely and the TCC's brokers decided to come clean.[158]

8. At this juncture, one might be tempted to feel sorry for the investors who were lured into participating in TCC's attempt to circumvent the Commission's ban on partial settlements. Such sympathy would be misplaced. Most of the key individuals in these 21 partnerships; i.e., signing partners, managing partners etc., were fully aware of the breadth and terms of the scam TCC was attempting to perpetrate. In fact the conclusion is warranted that almost all of the partners in each of the 21 partnerships were fully cognizant of TCC's efforts to implement an RSA "business plan" that would achieve the same results as the MSA alliances, and they willingly participated in that implementation.

9. Moreover, the 21 applicants and licensees selected a few representative partners to testify on their own behalf in this proceeding. So the Trial Judge was given an evidentiary snapshot of the partnership's equity holders. Based on his observations of the demeanor of those representative witnesses, the Trial Judge concluded that for the most part[159] the individual partner witnesses were a grasping, penurious lot, a sorry bunch of witnesses. They were perfectly willing, indeed anxious, to bend the truth and/or lie outright if they even suspected it would benefit them financially. More importantly, they appeared anxious to find a scapegoat (with money of course) that they could blame for their own shortcomings. The targeted scapegoat turned out to be attorney William Franklin of Pepper and Corazzini.[160] But as the findings *supra.* show, the partnerships involved failed to transfer blame for their own wrongdoing.

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[157] Franklin, as well as many other cellular attorneys, apparently believed that the FCC lacked the regulatory backbone to enforce their partial settlement prohibition. He felt that the Commission would blink at RSA cellular rules infractions. So he openly advised the TCC-prepared partnerships to keep decisionally significant facts from the Commission. For example, he tacitly advised Alee Cellular Communications not to tell the FCC that one of its partners was an alien (See Finding 184 *supra.*).

[158] Only one of the 21 applicants and licensees involved here have seriously asserted that it ". . .is not now and never has been a party to the [MCRSA] agreement." That was Alpha Cellular. That assertion proved totally spurious. As one of Alpha's partners, Bob Chapman, said to TCC executive and broker Tye St.James: "What happens when we get that construction permit in our hot little hands, . . .and then the FCC finds out about our linked partnerships?"

[159] Some of the partnership witnesses proved creditable. Certainly Richard Flippin, Allan K. Hammell, Eugene Litten, Dorothy Roberts, and even Edward J. Massey (a TCC broker) appeared to have taken their oath seriously at the administrative hearing level.

[160] As previously noted (Conclusion 3 *supra.*) neither TCC nor its brokers have the financial wherewithal to reimburse the individual partner investors. So they would make poor scapegoats. Moreover, it was William Franklin who included the exculpatory clauses in the MCRSAs (Paras.8-4 through 8-6) that protected TCC and its brokers from the investing partners. See Findings 60 and 69 *supra.* Accordingly, the individual partners of Centaur Partnership, Pinellas Communications, JayBar Communications, and Bay Cellular have brought a lawsuit against Pepper and Corazzini (William Franklin) in the United States District Court for the District of Columbia. They are suing for in excess of $25 million plus costs and reasonable attorney fees. Also EJM Cellular Partners are suing Pepper and Corazzini in the Superior Court for the District of Columbia. They are suing for in excess of $6 million plus costs and reasonable attorney fees. See Motion to Supplement the Record filed by Pepper and Corazzini on February 11, 1992, and FCC 92M-251 released February 26, 1992.

10. The partner-investor witnesses in this case are *unlike* listeners in a comparative broadcast case, or telephone users in a common carrier rate case. These investor-witnesses are speculators, and they performed like speculators. They wore their greed on their sleeve.

11. It must be emphasized that the Commission has treated these 21 applicants and licensees in a more than fair manner. Even after the Commission learned that all 21 had willingly joined in the conspiracy to bypass the newly developed RSA allocation rules, they didn't throw them into hearing (as some itinerant trial judge might want to do). Instead the Commission's Common Carrier Bureau conducted a thorough investigation into the past activities of all 21 (MSD 90-5). It was only after the Bureau was faced with incontrovertible facts about the duplicity of *all* 21 that they designated them for hearing.

12. We've held a full trial type hearing. We've examined some 600 written exhibits and heard from some 57 witnesses. With one exception the Trial Judge has strictly followed the Hearing Designation Order's trial instructions. That one exception relates to the topic of mitigation. The Bureau Chief took the position that mitigation evidence should not be adduced because "evidence of mitigation is not pertinent."

13. The Trial Judge ruled that any applicant or licensee could present any relevant mitigation evidence they saw fit. He did so for three basic reasons. First, he doesn't want the Court of Appeals to rule that it was arbitrary and capricious to preclude an applicant from presenting evidence of mitigating factors. Administrative hearings are a search for the *whole* truth. If part of that *whole* truth is the existence of relevant mitigating circumstances, so be it. Let's look at it and weigh it accordingly.

14. Secondly, the administrative appellate bodies; i.e., the Review Board and ultimately the full Commission should have the *whole* truth before them before arriving at their decisions.

15. Third, and finally, if any or all of these 21 applicants and licensees have deliberately flaunted the Commission's RSA cellular rules (and it now appears that they have), but there is a valid reason for having done so, we would be remiss not to have that reason as part of the evidentiary record. Elementary fairness demands it.

16. Analyzing the evidence adduced during this substantial hearing (Conclusions 1-15 supra.) the following Summary chart has been constructed. The chart capsulizes the evidentiary record for each of the 21 applicants and licensees and is designed to give the reader a picture of the scope of the evidence adduced on each.

CHART

	47CFR 22.33	47CFR 22.921	47CFR 22.922	47CFR 22.923 (b)(7)	47CFR 1.65	Abuse of Process	Mitigation Plea	Other Violations
A-1 Cellular	V	V	V	V	V	NA	C	O
Cranford Cellular	V	V	V	V	V	NA	C	V1/
New Era Cellular	V	V	V	O	V	NA	C	V1/
Alee Cellular	V	V	V	O	V	NA	C	V2/
TNT Communications	V	V	V	V	V	NA	C	O
Cel-Tel Communications	V	V	V	V	V	NA	C	O
Algreg Cellular Engineering	V	V	V	V	V	NA	C	O
Jaybar Communications	V	V	V	V	V	NA	C	O
Pinellas Communications	V	VV	V	V	V	NA	C	O
Florida Cellular	V	V	V	O	V	NA	C	O
Bay Cellular of Florida	V	V	VV	VV	V	NA	C	O
Centaur Partnerships	V	V	V	V	VV	NA	C	V3/
EJM Cellular	V	V	V	O	V	NA	C	V2/
Data Cellular Systems	V	V	V	V	V	NA	C	V4/
Satellite Cellular	V	V	V	V	V	V	C	V4/
Signal Cellular	V	V	V	V	V	NA	C	O
Crystal Communications	V	V	V	O	V	V	C	O
Cellular Pacific	V	V	V	V	V	V	C	O
North American Cellular	V	V	V	V	V	V	C	O
Bravo Cellular	V	V	V	V	V	NA	NA	V
Alpha Cellular	V	V	V	VV	V	NA	NA	O

V = Violation; VV = more than one violation; NA = not applicable;
O = No violation found; C = Considered but rejected.
1/ Abdication of control violation.
2/ Alien ownership violation.
3/ False or incomplete ownership structure.
4/ Ex Parte Violation.

* *

17. Based on the Findings of Fact (Findings 1-700 supra.), and the above Chart (Conclusion 16 supra.), certain further conclusions are warranted.

18. By entering into the Mutually Contingent Risk Sharing Agreements (MCRSAs) every one of the 21 applicants and licensees violated 47 CFR 22.33(b)(2). That rule prohibits partial settlement agreements among nonwireline applicants. This violation alone mandates denial of their applications and/or revocation of their construction permits.

19. By entering into the MCRSAs every one of the 21 applicants and/or licensees have violated both 47 CFR 22.921 (which prohibits any direct or indirect ownership interest in more than one RSA application for the same market) and 47 CFR 22.922 (which prohibits the transfer of interests in RSA cellular applications). Either of these two violations standing alone mandates denial of their applications and/or revocation of their construction permits. In addition, both the chart and the findings demonstrate that one of the applicants, Pinellas Communications is guilty of two 47 CFR 22.921 violations, and Bay Cellular of Florida is guilty of two 47 CFR 22.922 violations.

20. By entering into the MCRSAs and then failing to timely report this decisionally significant event to the Commission every one of the 21 applicants and licensees have violated 47 CFR 1.65; i.e., they have failed to keep their RSA applications complete and accurate. The record also supports the conclusion that these 1.65 violations were deliberate and egregious. Therefore such violations standing alone mandate denial of their applications and/or revocation of their licenses. By failing to timely file a 47 CFR 1.65 amendment, they left the Commission process thousands and thousands of applications that would not have otherwise needed to be processed.

21. Next, the record demonstrates that all but five of these 21 applicants and licensees have falsely certified their RSA applications in violation of 47 CFR 22.923(b)(7). However, the applicants' and licensees' opponents failed to make false certification cases against New Era Cellular, Alee Cellular, Florida Cellular, EJM Cellular, and Crystal Communications. On the other hand the record also demonstrates that Bay Cellular of Florida and Alpha Cellular are guilty of more than one 22.923(b)(7) false certification. Falsely certifying an initial application is a grass roots violation. It strikes at the very heart of the Commission's allocation processes. Such basic deception forms still another independent reason for denying the sixteen transgressors.

22. In addition to the in-common issues that the Chief, Common Carrier Bureau designated against all 21 applicants and licensees, the Chief also designated a 47 USC 310(b) alien ownership and lack of candor issues against Alee Cellular. See Finding 6 *supra.*, Issues L-4 and L-5. Those issues will be decided adversely to Alee. One of Alee's original partners, Shafi Sharifan was an alien. See Findings 151(13) and 168-193 *supra.* Accordingly, their application should have been dismissed *ab initio*, and would have been had the Commission known. However, when Alee discovered that Shafi Sharifan was an alien they tried to conceal that fact from the Commission. The concealment was spearheaded by TCC broker Allan Kane. So issues L-4 and L-5 are decided adversely to Alee and form still another independent reason for revoking Alee's license for the New Mexico 3 (Catron) RSA.

23. The Trial Judge also added abuse of process issues against four of the 21; i.e., Satellite Cellular, Crystal Communications, Cellular Pacific and North American. See Finding 9 and Issue L-7 *supra.* The record shows that these four have abused the Commission's discovery processes. They deliberately thwarted legitimate inquiries into their cellular application activities by refusing to comply with valid document discovery requests and/or by complying in such an untimely manner as to nullify the effectiveness of the request. This type of an abuse, especially in a proceeding of this size and complexity, cannot be tolerated. Issue L-7 is decided adversely to the four, and it is concluded that they are not basically qualified to be Commission licensees.

24. Since it has been determined that Satellite Cellular, Crystal Communications, Cellular Pacific, and North American have all abused the Commission's process, the Notice of Forfeiture at FCC 91M-3213, released November 5, 1991 becomes operable. It is concluded that Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications have each abused the Commission's discovery processes thus violating 47 CFR 1.311 and 47 CFR 1.325. Consequently each will be assessed a forfeiture of $25,000.

25. As previously noted (Conclusions 12-15 *supra.*), the Trial Judge ruled early-on that any or all of the 21 applicants and licensees could present mitigating evidence if they chose to do so. Nineteen of the 21 made half-hearted, poorly-presented stabs at presenting a case in mitigation. None of those efforts came close to being convincing and consequently were rejected.

26. As generally happens in a case of this size and complexity, during the course of the hearing it developed that some of the applicants and licensees had violated other non-designated Commission rules. The Trial Judge did not stop the hearing each time one of these violations was uncovered, and add an issue or issues for further trial. If he had, we'd still be in hearing. Instead he allowed the evidence on these additional violations to be developed and used for anti-mitigation purposes. In other words, if any of the violating applicants or licensees had presented a reasonably persuasive case in mitigation (which they didn't) their opponents had the right to refer to the non-designated violations and argue that these applicants or licensees are not entitled to equity since they did not seek equity with clean hands.

27. A summary of these additional non-designated violations follow. Bravo Cellular and Centaur Partnership, *ab initio*, submitted false or incomplete ownership structures to the Commission. As previously noted (Findings 621-623 *supra.*) it is essential to any allocation scheme (even a lottery) that the allocator knows exactly who is being granted and who is being denied. That's about as basic as you can get. So the failure to give the Commission accurate ownership data to process is fundamentally fatal.

28. Next, and like Alee *supra.*, EJM Cellular violated 47 USC 310(b) by filing 428 RSA applications with an alien as part of their ownership structure. This is another fundamental ownership flaw.

29. The record shows that the Cranford Cellular and New Era partners completely abandoned control over their respective partnerships and turned over the reins to TCC broker, Allan Kane. Kane exercised complete control over

their partnership affairs.[161] Abdication of control undoes the allocation process. When a party applies for a franchise both the Commission and the public have the right to expect *that* party (not someone else) to prosecute *that* application and, if granted, to control and operate *that* franchise. Any other approach makes a mockery out of the allocation process.

30. Finally, both Data Cellular Systems and Satellite Cellular tried to influence the outcome of this adjudication by improper means. They solicited *ex parte* presentations from outside sources; namely, some 28 members of Congress. These multiple and flagrant violations of 47 CFR 1.1210 cannot and should not pass unnoticed. They eat at the very heart of our system of government-due process, fair play, open proceedings, unbiased, uninfluenced decisions. So even if Data Cellular and Satellite Cellular had staked out a reasonable mitigation position (which they did not), their lack of clean hands would preclude them from equitable consideration.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, *A-1 Cellular Communications'* applications for the Texas 10 (Navarro) RSA (File No.10409-CL-P-661-A-89) and the Missouri 11 (Moniteau) RSA (File No.10454-CL-P-514-A-89) ARE DENIED;

Cranford Cellular Communications' application for the Alabama 5 (Cleburne) RSA (File No.10611-CL-P-311-A-89) IS DENIED;

New-Era Cellular Telecommunications' application for the Arkansas 9 (Polk) RSA (File No.40563-CL-P-332-A-89) IS DENIED;

Alee Cellular Communications' construction permit for the New Mexico 3 (Catron) RSA (File No.10074-CL-P-555-A-88) Station KNKN 271 IS REVOKED;

TNT Communications' applications for the North Dakota 3 (Barnes) RSA (File No.10233-CL-P-582-A-89) and the Puerto Rico 5 (Ceiba) RSA (File No.10678-CL-P-727-A-89) ARE DENIED;

Cel-Tel Communications' application for the Ohio 5 (Hancock) RSA (File No.10912-CL-P-589-A-89) IS DENIED;

Algreg Cellular Engineering's application for the Alabama 1 (Franklin) RSA (File No.10607-CL-P-307-A-89) IS DENIED;

Jaybar Communications' construction permit for the Arizona 6 (Graham) RSA (File No.10042-CL-P-323-A-88) Station KNKN 251 IS REVOKED;

Pinellas Communications' application for the Pennsylvania 2 (McKean) RSA (File No.10808-CL-P-613-A-89) IS DENIED;

Florida Cellular's application for the Missouri 2 (Harrison) RSA (File No.10445-CL-P-505-A-89) IS DENIED;

Bay Cellular of Florida's application for the Mississippi 5 (Washington) RSA (File No.10754-CL-P-497-A-89) IS DENIED;

Centaur Partnership's application for the South Carolina 7 (Calhoun) RSA (File No.10720-CL-P-631-A-89) IS DENIED;

EJM Cellular Partners' applications for the Oklahoma 1 (Cimarron) RSA (File No.10567-CL-P-596-A-89) and the Wyoming 4 (Niobrara) RSA (File No.10116-CL-P-721-A-89) ARE DENIED;

Data Cellular Systems' construction permit for the California 10 (Sierra) RSA (File No.10029-CL-P-345-A-88), (File No.07080-CL-MP-91) Station KNKN 250 IS REVOKED;

Satellite Cellular Systems' construction permit for the Arizona 1 (Mohave) RSA (File No.10037-CL-P-318-A-89) Station KNKN 268 IS REVOKED;

Signal Cellular Communications application for the South Carolina 8 (Hampton) RSA (File No. 10721-CL-P-632-A-89) IS DENIED;

Crystal Communications Systems' construction permit for the Oregon 1 (Clatsop) RSA (File No.10078-CL-P-606-A-88) Station KNKN 309 IS REVOKED;

Cellular Pacific's construction permit for the California 11 (Eldorado) RSA (File No.10031-CL-P-346-A-88), (File No.06606-CL-MP-90), (File No.06688-CL-MP-90) Station KNKN 252 IS REVOKED;

North American Cellular's construction permit for the Idaho 1 (Boundary) RSA (File No.10066-Q-P-388-A-88) Station KNKN 253 IS REVOKED;

Bravo Cellular's application for the North Carolina 15 (Cabarrus) RSA (File No.10673-CL-P-579-A-89) IS DENIED;

Alpha Cellular's Application for the Ohio 2 (Sandosky) RSA (File No.10909-CL-P-586-A-89 IS DENIED; their construction permit for the Indiana 8 (Brown) RSA (File No.10318-CL-P-410-A-88) Station KNKN 340 IS REVOKED; and their application to assign Station KNKN 340 (File No.10318-CL-P-410-A-88) IS DISMISSED as moot;

Satellite Cellular Systems IS FINED $25,000;

Crystal Communications Systems IS FINED $25,000;

Cellular Pacific IS FINED $25,000; and

North American Cellular IS FINED $25,000.[162]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

[161] It could be plausibly argued that 20 of the 21 applicants and licensee (sans Algreg Cellular Engineering) *abdicated* control of their partnership affairs to TCC. Algreg, a sole proprietorship, is owned by Greg Neely, TCC's president.

[162] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 92-443

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)))	CC Docket No. 92-90

REPORT AND ORDER

Adopted: September 17, 1992 Released: October 16, 1992

By the Commission: Commissioner Barrett issuing a statement.

TABLE OF CONTENTS

Title	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	2
III. DISCUSSION	6
A. Definitions	6
B. Procedures for Avoiding Unwanted Telephone Solicitations to Residences	7
1. Live vs. Artificial or Prerecorded Voice Solicitations	8
2. Alternatives to Restrict Telephone Solicitations to Residences	10
National Database	11
Network Technologies	16
Special Directory Markings	18
Industry-Based or Company-Specific Do-Not-Call Lists	20
Time of Day Restrictions	25
C. Autodialers and Prerecorded Messages	27
1. General Prohibitions	27
2. Prior Express Consent	29
3. Exemptions to Prohibited Uses of Prerecorded Messages	32
Established Business Relationship	32
Debt Collection Calls	36
Tax-Exempt Nonprofit Organizations and Non-Commercial Calls	40
4. Clarifications	42
Elderly Home	42

Radio Common Carriers 43
Voice Messaging Services 46
Public Utilities 49

D. Technical and Procedural Standards 52
1. Line Seizure - 5 Second Hang-up Requirement 52
2. Identification Requirements for Artificial or Prerecorded Voice Systems 53
3. Facsimile Machines 54

E. Enforcement 55
1. Private Right of Action 55
2. State Law Preemption 56
3. Other Matters 57

IV. CONCLUSION 60

V. PROCEDURAL MATTERS 61

VI. ORDERING CLAUSES 62

I. INTRODUCTION

1. By this action, the Commission is amending its rules and regulations to establish procedures for avoiding unwanted telephone solicitations to residences, and to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

II. BACKGROUND

2. This proceeding was initiated by passage of the Telephone Consumer Protection Act of 1991, Public Law 102-243, December 20, 1991, which amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 et seq., by adding a new section, 47 U.S.C. § 227 (TCPA). In its preamble, the TCPA recognizes the legitimacy of the telemarketing industry, but states that unrestricted telemarketing could be an intrusive invasion of privacy and, in some instances, a risk to public safety. Accordingly, the TCPA imposes restrictions on the use of automatic telephone dialing systems, the use of artificial or prerecorded voice, and on the use of telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, any health care facility or similar establishment, and numbers assigned to radio common carrier services or any service for which the called party is charged for the call, unless the call is made with the prior express consent of the called party or is made for emergency purposes. The TCPA also prohibits calls made without prior express consent to a residence using an artificial or prerecorded voice to deliver a message, unless it is an emergency call or is exempted by the Commission. Unsolicited advertisements may not be transmitted by telephone facsimile machines. Those using such machines or transmitting artificial or prerecorded voice messages are subject to certain identification requirements. The statute

outlines various remedies for violations of the TCPA. Finally, the TCPA requires that the Commission consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.

3. The TCPA notes that, "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." TCPA at Section 2(9). The preamble of the TCPA notes that the use of telemarketing is widespread, and generates more than $400 billion in commercial activity each year, through more than 30,000 businesses employing more than 300,000 people. TCPA at Section 2(2)-(4).[1] Our task in this proceeding is to implement the TCPA in a way that reasonably accommodates individuals' rights to privacy as well as the legitimate business interests of telemarketers.

4. In accordance with the requirements of the TCPA, the Commission, on April 10, 1992, adopted a Notice of Proposed Rulemaking (NPRM) in this proceeding.[2] The NPRM proposed rules implementing provisions of the TCPA which place restrictions on the use of automatic telephone dialing systems and artificial or prerecorded messages. The NPRM requested comment on the proposed rules, and requested comment and analysis regarding several alternative methods for restricting telephone solicitations to residential subscribers. Approximately two hundred and forty parties, including 83 newspapers, 25 industry and trade associations, 6 consumer advocacy groups, and 17 common carriers submitted comments or reply comments in response to the NPRM. A list of those parties is contained in Appendix A.[3]

5. In this proceeding, we analyze the costs and benefits associated with each of the alternatives for meeting the goals of the TCPA. The rules we adopt attempt to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services. We adopt rules which protect residential telephone subscriber privacy by requiring telemarketers to place a consumer on a do-not-call list if the consumer

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1 The President signed the bill into law because it gives the Commission "ample authority to preserve legitimate business practices." Statement by the President upon signing the TCPA into law, December 20, 1991.

2 See Notice of Proposed Rulemaking in CC Docket No. 92-90, 7 FCC Rcd 2736 (1992). The Commission designates Subpart L of Part 64 of its rules as the appropriate location for most of the rules implementing the TCPA. Additional rules implementing the TCPA which address certain requirements for terminal equipment are located in Part 68 of the Commission's rules. The full text of the TCPA is included as an appendix to the NPRM. The rules adopted in this order appear in Appendix B.

3 In addition to comments filed by the parties listed in Appendix A, we received numerous letters and other informal comments in response to the NPRM. We have considered each of these additional comments in adopting this Report and Order.

requests not to receive further solicitations.[4] Further, we adopt, as proposed: (1) the prohibitions on calls made by automated telephone dialing systems and artificial or prerecorded voice messages (in the absence of an emergency or the prior express consent of the called party) to emergency lines, health care facilities, radio common carriers or any number for which the called party is charged for the call; (2) the prohibition on artificial or prerecorded voice message calls to residences; (3) the prohibition on the transmission of unsolicited advertisements by telephone facsimile machines; (4) the requirements that telephone facsimile machines and artificial or prerecorded voice messages identify the sender of such transmissions; (5) the requirement that artificial or prerecorded voice messages release the line of the called party within 5 seconds of notification that the called party has hung up; and (6) the prohibition on calls which simultaneously engage two or more lines of a multi-line business. We exempt from the prohibition on prerecorded or artificial voice message calls to residences those calls: not made for commercial purposes; made for commercial purposes which do not transmit an unsolicited advertisement; made to a party with whom the caller has an established business relationship; and non-commercial calls by tax-exempt nonprofit organizations.

III. DISCUSSION

A. Definitions

6. Many commenters request clarification, or offer their own definitions, of terms which appear in the NPRM and the TCPA. Accordingly, definitions of the following terms are set forth in Section 64.1200(f) of our rules, 47 C.F.R. § 64.1200(f):[5] automatic telephone dialing system ("autodialer"); established business relationship; telephone facsimile machine; telephone solicitation, and; unsolicited advertisement.[6] We emphasize that the term autodialer does not include the transmission of an artificial or prerecorded voice. As indicated in the discussion below, we decline to adopt definitions offered by commenters where such definitions fit only a narrow set of circumstances, in favor of broad definitions which best reflect legislative intent by accommodating the full range of telephone services and telemarketing practices.

B. Procedures for Avoiding Unwanted Telephone Solicitations to Residences

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4 In this order, the term "telemarketer" refers to any person or entity making a telephone solicitation (regardless of the precise means used to place or complete such a call).

5 See Appendix B.

6 All terms except "established business relationship" are defined in the TCPA (see § 227(a)); we have incorporated those statutory definitions in our rules.

7. The TCPA and our rules, as adopted here, define "telephone solicitation" as the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax-exempt nonprofit organization. Definitions of the terms "prior express consent" and "established business relationship" are set forth at paras. 29-35, infra. The TCPA requires that the Commission prescribe regulations to implement procedures for protecting the privacy rights of residential telephone subscribers in an efficient, effective, and economic manner. § 227(c)(2). In determining which methods or procedures would best enable subscribers to avoid unwanted telephone solicitations, the Commission analyzed: the respective costs and benefits of several alternatives; which public or private entities are capable of administering the available alternatives; the impact of the various alternatives on small businesses and second class mail permit holders; and whether there is a need for additional authority from Congress to further restrict telephone solicitations.[7]

1. Live vs. Artificial or Prerecorded Voice Solicitations.

8. In the NPRM, the Commission requested comment on whether it is in the public interest to recognize an inherent difference in the nuisance factor between artificial or prerecorded voice calls as opposed to live solicitations. Further, the NPRM raised the issue of whether regulation of live solicitation is necessary to protect residential subscriber privacy rights. Most commenters do not object to some form of restriction on live solicitations, but distinguish between live solicitations, particularly those made by predictive dialers (which deliver calls to live operators), and solicitations completed by artificial or prerecorded voice messages. These commenters contend that artificial or prerecorded voice solicitations are a greater nuisance and an invasion of privacy, and cite the relatively greater number of complaints to

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7 47 U.S.C. § 227(c). The TCPA also requires the Commission to consider whether specific regulations should be adopted regulating artificial or prerecorded voice calls to businesses. § 227(b)(2)(A). Concerns regarding telemarketer intrusions upon commerce are largely addressed in the rules, which prohibit autodialed and artificial or prerecorded message calls where the called party would incur costs for such calls, such calls would likely affect public health and safety, or where such calls would tie up two or more lines of a business simultaneously. See 47 C.F.R. §§ 64.1200 (a)(1), (a)(4), and (b). Commenters express concern that prerecorded message calls will affect public health and safety and impede commerce. Most commenters, however, do not raise privacy concerns with respect to prerecorded calls to businesses. Based on the record and on the scope of the prohibitions on autodialers and prerecorded messages in the rules we adopt today, we are not persuaded that additional prohibitions on prerecorded voice message calls to businesses are necessary at this time.

the Commission about this specific mode of solicitation to support this claim.[8] Several commenters, however, cite legislative history in asserting that Congress intended to regulate all solicitations, whether live or artificial or prerecorded voice, because both types of unwanted solicitations represent a nuisance and an invasion of privacy.[9] These commenters note that the figures on consumer complaints received by the Commission, suggesting that live solicitations are much less intrusive, do not fully reflect the volume of complaints regarding live solicitations because not all such complaints are reported directly to the Commission.[10]

9. While the commenters demonstrate that there are separate privacy concerns associated with artificial or prerecorded solicitations as opposed to live operator solicitations (e.g. calls placed by recorded message players can be more difficult for the consumer to reject or avoid), the record as a whole indicates that consumers who do not wish to receive telephone solicitations would object to either form of solicitation. We are persuaded by the comments, the numerous letters from individuals, and the legislative history that both live and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions.[11] Accordingly, as discussed below, we select company-specific do-not-call lists as the most effective alternative to protect residential subscribers from unwanted live and artificial or prerecorded voice message solicitations. For the reasons discussed below, we believe that this alternative most effectively balances the privacy interests of residential subscribers who wish to avoid unwanted solicitations (whether live or by artificial or prerecorded message) against the interests of telemarketers in maintaining useful and responsible business

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8 See, e.g., comments of American Telephone and Telegraph (AT&T).

9 See, e.g., comments of Center for the Study of Commercialism (CSC) and National Consumers League (NCL). Commenters point to statements in reports on earlier versions of the TCPA noting that technology which permits a greater volume of solicitations with less personnel has led to an increasing number of consumer complaints and has prompted at least 40 states to enact restrictions on the use of autodialers, prerecorded message players, and unwanted solicitations. As examples of the source of consumer complaints, the reports note that callers making solicitations often fail to identify themselves, and that autodialers and prerecorded messages do not release a line after hangup. See Senate Report 102-177, 102d Cong., 1st Sess. (1991), p. 2; Senate Report 102-178 102d Cong, 1st Sess. (1991), pp. 2-3.

10 Lejeune Associates of Florida (Lejeune) notes that Florida receives 300-500 complaints per month under its telephone solicitation statute. The Ohio Public Utilities Commission (OPUC) receives an average of 100 telephone solicitation complaints per month. The Direct Marketing Association (DMA) notes that 400,000 consumers have asked to be included in its Telephone Preference Service, which functions as a do-not-call list for the telemarketing industry.

11 See Senate Report 102-177, 1st Sess., pp. 1-3 (1991); House Report 102-317, 1st Sess., pp. 8-10.

practices and of consumers who do wish to receive solicitations.[12]

2. Alternatives to Restrict Telephone Solicitation to Residences.

10. As directed by the TCPA, the Commission has considered a number of alternatives for residential telephone subscribers to avoid receiving unwanted telephone solicitations. These include a national database, network technologies, special directory markings, time of day restrictions, and industry-based or company-specific do-not-call lists. The NPRM requested comment, as well as focused cost/benefit analyses, of these and any other methods proposed for protecting the privacy of residential telephone subscribers.

11. National Database. A majority of the commenters oppose this option because a national database of consumers who do not wish to receive telemarketing calls would be costly and difficult to establish and maintain. Estimates to start and operate a national database in the first year ranged from $20 million to $80 million, with commenters agreeing that operations would cost as much as $20 million annually in succeeding years.[13] The American Express Company (AMEX) asserts that the Commission's original estimates did not include the costs of educating consumers about the database, gathering and disseminating the data, and regularly updating the database. Several commenters, noting that businesses participating in state do-not-call databases pay as much as $1,500 annually, contend that many small businesses simply may not be able to afford participation in a national database.[14] Commenters assert that for most small businesses, participation would require an investment in computer software and hardware if the database were to be available on floppy disk, or would require additional personnel to review lists if a paper version of the list were made available to small businesses.[15] Many commenters express concern that consumers, as well as telemarketers, would ultimately bear the costs of a national database, either through higher prices charged by telemarketers or through costs incurred by a national database administrator and not recovered through fees on telemarketers. Further, several commenters question how participation in a national database would be enforced against telemarketers.[16]

12. Numerous commenters argue that consumers would be disappointed in a national database because they would still receive unwanted calls after placing themselves in the national database, either because there will be a time lag in getting their preferences to telemarketers or because they would

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12 Autodialer and prerecorded message calls are subject to a stricter standard, as discussed in paras. 27-51, infra.

13 See, e.g., comments of AT&T.

14 See, e.g., comments of Securities Industry Association (SIA).

15 See, e.g., comments of National Retail Federation (NRF).

16 See, e.g., comments of Pacific Bell, Nevada Bell (Pacific Bell).

still receive calls from exempted businesses or organizations.[17] See paras. 32-41, infra. They note that since nearly one-fifth of all telephone numbers change each year, any database, whether local, regional, or national, would be continuously obsolete and would require constant updates in order to remain accurate.[18] Commenters assert that quarterly or semiannual updates would not be sufficiently frequent to avoid obsolescence or to accommodate consumer expectations.[19] AT&T states that a national database would contain millions of names and addresses, and that at least 20 percent of those would change every year as people move, change telephone numbers, disconnect service, or simply decide to enter or leave the database. Commenters also oppose this option because consumers must make an all or nothing choice: either reject all telemarketing calls, even those which the consumer might wish to receive, or accept all telemarketing calls, including those which the consumer does not wish to receive.[20] Moreover, several commenters question whether the confidentiality of telephone subscriber information could be adequately protected if it were maintained on a widely accessible list, and note that such information could be misused to compile telemarketing lists.[21] Other commenters contend that a national do-not-call database would destroy the confidentiality of subscribers having unpublished or unlisted numbers.[22]

13. Commenters who support the creation of a national do-not-call database contend that it is the most efficient and effective means for avoiding unwanted telephone solicitations. Lejeune Associates and CSC contend that the do-not-call database which Lejeune currently operates in Florida could easily be expanded to form a national do-not-call database. CSC and OPUC suggest that an independent organization (such as the National Exchange Carrier Association or a telemarketing trade association) could administer a national database, perhaps under the supervision of a board of governors from government, th industry, and the public. Consumer Action envisions a system in which all telemarketers would send their calling lists to a third party administrator who would compare and remove all names which appear on the administrator's national do-not-call database. It maintains that such a system would allow participation by subscribers with unpublished numbers, and would lower the risk of breaches in subscriber confidentiality. The Independent Telecommunications Network (ITN) suggests that the Line Information Database (LIDB) currently maintained by local exchange carriers (LECs) could be used to register

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17 See, e.g., comments of SafeCard Services, Inc. (Safecard); and Sprint.

18 See, e.g., comments of AT&T.

19 See, e.g., comments of Sprint.

20 See, e.g., comments of DMA.

21 See, e.g., comments of Consumer Bankers Association (CBA).

22 See, e.g., comments of J.C. Penney. Southwestern Bell Telephone (SWBT) notes that laws in each of the states it serves prohibit SWBT from breaching the confidentiality of subscribers having unpublished or unlisted numbers.

subscriber do-not-call preferences nationwide, and could be accessed by telemarketers with the proper equipment for a minimal fee for each query.

14. Upon careful consideration of the costs and benefits of creating a national do-not-call database, we believe that the disadvantages of such a system outweigh any possible advantages. A national database would be costly and difficult to establish and maintain in a reasonably accurate form. As noted above, the most conservative estimates assume costs of $20 million in the first year of operation alone. The impact of the costs of retooling or hiring additional personnel for compliance would be greater on small or start-up businesses. Moreover, the greater these costs to smaller entities, the more likely that such costs would be passed on to consumers.[23] Telemarketers' only means of making up the difference, given the absence of federal involvement in the establishment, operation, or maintenance of a national database, would be to pass along such costs to consumers.[24] Commenters supporting a national database suggest that it be updated at least every three months. However, frequent updates would increase costs for both the database administrator and telemarketers. In addition, many commenters point out that each update would increase the potential for error in publishing or recording the telephone numbers of consumers requesting placement on the list. Regional or local telemarketers could be required to purchase a national do-not-call database even if they made no solicitations beyond their states or regions; additional rules to compensate for such varied telemarketing practices would, as with small businesses, increase the complexity and cost of implementing a national database. Additionally, commenters indicate that on-line computer databases present significantly greater technological difficulties.[25]

15. We are persuaded by the comments that a national database which

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23 We note that the TCPA prohibits any alternative which calls for any charge for participation to residential subscribers. § 227(c)(2). The Florida database, for example, charges subscribers for their participation in the database. Nynex Telephone Companies (Nynex) states that although New England Telephone has spent more that $1 million to implement a statewide do-not-call database in Massachusetts, only nine telemarketers have purchased the $300 do-not-call list. Nynex further notes that Massachusetts allows New England Telephone to recover costs of its state do-not-call database from the subscriber rate base.

24 Commenters largely support the Commission's tentative conclusion in the NPRM that a national database should neither receive federal funds nor a federal contract for its establishment, operation, or maintenance. NCL objects to the finding, arguing that the failure of self-regulation, along with the TCPA, require strict federal regulatory oversight of telemarketing practices. In light of the action taken in the TCPA and in our rules to restrict the most abusive telemarketing practices, and in the absence of more persuasive evidence to support federal expenditures to further restrict such practiceS, we find that it is not in the public interest to pass on to taxpayers the costs of a national database system.

25 See, e.g., comments of Citicorp, Sprint.

includes information in addition to telephone numbers (for greater accuracy and for verification purposes) could make national database information a target for unscrupulous telemarketers, and would present problems in protecting telemarketer proprietary information. A national database would similarly risk the privacy of telephone subscribers who have paid to have unpublished or unlisted numbers. While a national database would serve those who wish to avoid all telemarketing calls, commenters point to the success of telemarketing as proof that telephone subscribers by and large would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear.[26] In view of the many drawbacks of a national do-not-call database, and in light of the existence of an effective alternative (company-specific do-not-call lists), we conclude that this alternative is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations.

16. Network Technologies. Most commenters oppose this option because they contend that it is not technologically feasible and is too costly.[27] The use of a special area code or telephone number prefix for telemarketers, for example, requires the called party to be provided with a means to reject telephone solicitations by using automatic number identification (ANI) or a Caller ID service to block calls from a designated telemarketer prefix. Commenters concur that the SS7 technology which facilitates call blocking is costly to deploy; that the SS7 technology is not available to all telephone subscribers in all areas of the nation; that the North American Numbering Plan (NANP) may lack sufficient numbers to set aside an entire prefix for telemarketers; and that a service blocking all telemarketer calls would force consumers to sacrifice any choice between telemarketers from which they do and do not wish to hear.[28] Even if this option were feasible, commenters argue that businesses would have to change their telephone numbers and all references to those numbers in every medium, which would be prohibitively expensive. Moreover, businesses may decide to invest in separate telephone lines for telemarketing to customers with an ongoing business relationship, an expense smaller enterprises perhaps could not afford.[29] GTE Service Corporation (GTE), SNET, and U.S. West express concern that exchange carriers would be required to finance the implementation of this option, when telemarketers alone should bear the costs of protecting subscribers from unwanted telephone solicitations. Commenters concur that any ubiquitous call blocking system would require costly switch upgrades by LECs to accommodate the SS7 technology which permits call

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26 See, e.g., comments of AMEX and Olan Mills. Moreover, based upon the comments, we are not persuaded that the current state of technology would permit the rapid and cost-efficient utilization of LIDB to function as a national do-not-call database. See, e.g., comments of ITN, Pacific Bell, Southern New England Telephone (SNET), SWBT, and Sprint.

27 See, e.g., comments of AT&T, Lejeune Associates, and Sprint.

28 See, e.g., comments of SNET, Sprint.

29 See, e.g., comments of SIA.

blocking.[30] In contrast, InterVoice and ITN argue that much of the infrastructure necessary to implement call blocking network technology nationally is already in place, and that this technology is an effective means for avoiding unwanted solicitations.

17. In view of the costs and technological uncertainties associated with implementation, we reject the network technologies alternative for avoiding unwanted telephone solicitations. This alternative would ultimately place the cost of consumer privacy protection on telemarketers, local exchange carriers, and consumers alike. The more than 30,000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers to numbers which carry a telemarketing prefix, and would perhaps be forced to obtain new lines for conducting operations other than solicitations. All LECs would be forced to upgrade their networks without regard to demand for technology. Moreover, it is unclear whether fees on telemarketers would be sufficient to cover the costs of making call blocking technology universally available, raising the possibility that such costs would be passed on to residential telephone subscribers, in violation of the TCPA. Based on the commenters' assessments of the cost and technological barriers to implementation of this alternative, we conclude that network technologies are not the best means for accomplishing the objectives of the TCPA at this time.

18. Special Directory Markings. A majority of commenters oppose this alternative because it would require telemarketers to purchase and review thousands of local telephone directories, at great cost and to little ultimate effect. Commenters note, for example, that telemarketing firms compile calling lists from many sources other than local telephone directories.[31] Hence, many telemarketers would not ordinarily discover a subscriber's do-not-call preference in the process of targeting likely prospects. Commenters argue that this alternative has many of the disadvantages of the national database option, because subscribers would have to make an all or nothing choice about receiving telemarketing calls, and subscribers would be disappointed at the time lag in entering their preference, during which they would continue to receive unwanted calls. Moreover, since directories are published only once a year, the subscriber preference information would quickly become obsolete, and telemarketers would pay enormous costs to access any computerized telephone directories.[32] Commenters also argue that special directory markings would not

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30 See, e.g., comments of Bell Atlantic; BellSouth; Pacific Bell; and SNET.

31 See, e.g., comments of CSC, GTE.

32 See, e.g., comments of J.C Penney, North American Telecommunications Association (NATA) and SafeCard. Nynex states that inserting an asterisk to mark do-not-call preferences in its directories would cost its publishing division $100,000, in addition to $300,000 for an additional 400 tons of paper and $125,000 in printing costs. Nynex's experiment in using an asterisk to mark customer preferences received complaints that marks confused readers. BellSouth provided special directory markings in its state of Florida directory from October 1, 1987 to October 1, 1990. In its comments, BellSouth states that the service proved to be largely ineffective in reducing unwanted

permit subscribers with unpublished or unlisted numbers to avoid telephone solicitations.[33] BellSouth and Consumer Action argue that this option unfairly divides responsibility for curbing unwanted calls between LECs and telemarketers, when telemarketers alone should bear any relevant costs or administrative burdens.[34] Moreover, U.S. West contends that disappointed subscribers will seek relief from the LEC rather than an offending telemarketer if preferences are not respected or are not communicated to telemarketers in a timely fashion.

19. We agree with commenters that this alternative would be too costly and burdensome for telemarketers to implement efficiently, regardless of their size, especially given the existence of an effective alternative (company-specific do-not-call lists). Such a system would rely on much obsolete information and could not be updated in a timely fashion. Significantly, implementation of special directory markings would place much of the burden of cost and implementation on LECs, which could not pass on such costs to residential telephone subscribers because the TCPA prohibits charges to consumers for privacy protection. §227(c)(2). Unpublished and unlisted numbers could not be included in such a system. Ultimately, this option combines the disadvantages of maximum cost to all participants with minimal potential effectiveness, and therefore is not a suitable means of accomplishing the goals of the TCPA.

20. Industry-Based or Company-Specific Do-Not-Call Lists. A majority of commenters support company-specific do-not-call lists as the most effective, most easily implemented, and the least costly of each of the methods proposed to curb unwanted telephone solicitations.[35] Commenters supporting this approach state that the company-specific do-not-call list alternative appropriately places the burden of compliance squarely on telemarketers.[36] These commenters view this method as less costly and less burdensome because many telemarketers already maintain company-specific do-not-call lists, and because most telemarketers can readily verify and compare subscriber information with information drawn from their own customer lists.[37] Commenters favoring this option note several reasons for implementing it: (1) it is effective in halting unwanted solicitations; (2) it accords greater recognition of consumer privacy interests than a national database or special directory

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solicitations and was withdrawn. See comments of BellSouth at 9, n. 13.

33 See, e.g. comments of BellSouth and Consumer Action.

34 See, e.g., comments of National Telephone Cooperative Association (NTCA) and Pacific Bell.

35 See, e.g., comments of Citicorp; Olan Mills; Sprint; and SWBT.

36 See, e.g., comments of CUC International, Olan Mills, Pacific Bell.

37 See, e.g., comments of Ameritech Operating Companies (Ameritech) and Cox Enterprises, Inc. (Cox).

markings; (3) it eliminates anticompetitive concerns in special directory markings or a national database, in which phone companies could have access to proprietary information; (4) it allows desired solicitations; (5) it places costs squarely on telemarketers, yet avoids undue costs or restrictions for telemarketers; (6) it avoids burdening Commission resources; and (7) it appropriately balances legitimate privacy expectations against legitimate uses of telemarketing.[38]

21. In response to our observation in the NPRM that telemarketers would be required to produce evidence of compliance with any requirement mandating company or industry-based do-not call lists, several commenters suggest that telemarketers be required to follow certain guidelines for maintaining such lists. For example, commenters propose that telemarketers be required to: (1) maintain a written policy implementing its do-not-call procedures; (2) inform and train telemarketing representatives in the existence and implementation of the company-specific do-not-call list; (3) inform subscribers of their rights to be placed on such a list; (4) place a telephone subscriber on a do-not-call list within reasonable time after the request is made (or not later than 60 days); and (5) maintain the request for a reasonable period after the request is made.[39] Commenters assert that telemarketers who can certify and demonstrate compliance with the above should be afforded a legal presumption of compliance with the rules and allowed to use such demonstration as a defense in any private or Commission enforcement action.[40] A few commenters propose that telephone subscribers be notified of Commission policy and telemarketer procedures through telemarketer mailings, local subscriber phone directories, news, bill inserts, or in a live preamble prior to solicitation.[41] Some commenters propose that residential subscribers be given the option of contacting DMA, which maintains an industry-based do-not-call list (through its Telephone Preference Service), in lieu of contacting numerous companies individually.

22. Commenters opposed to industry-based or company-specific do-not-call lists contend that existing industry-based and company-specific lists have not reduced the number of unwanted telephone solicitations, and that Congress has found such efforts ineffective.[42] Further, these commenters argue that these alternatives provide no affirmative method for the consumer to avoid or reject a telemarketer's first call in advance. Moreover, Private Citizen, Inc. (Private Citizen) contends that telemarketers do not always heed an initial do-not-call request, and may call a consumer several times before honoring a

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38 See, e.g., comments of American Telemarketing Association (ATA), Citicorp.

39 See, e.g., comments of Citicorp; DMA; reply comments of AMEX and Ameritech.

40 See, e.g., comments of AMEX, Citicorp.

41 See, e.g., comments of Ameritech, Citicorp.

42 CSC cites House Report 102-317 at 19-20, finding the existing DMA list to be unsatisfactory because it is "not comprehensive in nature." See also comments of Consumer Action, Lejeune, and U.S. West.

consumer's request not to receive further calls or solicitations.

23. The legislative history suggests that properly implemented company-specific do-not-call lists would satisfy the statutory requirements of the TCPA.[43] In light of that assertion, and upon weighing the costs and benefits of company-specific and industry-based do-not-call lists against the costs and benefits of the other alternatives presented in the record, we conclude that the company-specific do-not-call list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations.[44] Such lists are already maintained on a voluntary basis by many telemarketers and could be established swiftly by individuals, small businesses, or large companies. Mandatory company-specific do-not-call lists would allow residential subscribers to selectively halt calls from telemarketers from which they do not wish to hear. Such lists would also afford residential telephone subscribers with a means to terminate a business relationship in instances in which they are no longer interested in that company's products or services. Additionally, businesses could gain useful information about consumer preferences, and can comply with such preferences without overly burdensome costs or administrative procedures. This alternative would best protect residential subscriber confidentiality because do-not-call lists would not be universally accessible, and could be verified with a telemarketer's own customer information. Company-specific do-not-call lists would impose the costs of protecting consumer privacy squarely on telemarketers rather than telephone companies or consumers who do not wish to be called. Moreover, the costs of maintaining a do-not-call list are less likely to be passed on to residential telephone subscribers even indirectly, because they would be minimal, involving only the addition of do-not-call preferences to

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43 "With respect to both company-specific and industry-wide databases, the Commission should consider whether making such practices mandatory, and imposing substantial sanctions for violations would increase their effectiveness to the point that they could satisfy the statutory requirements of this Act." House Report 102-317, 102d Cong., 1st Sess. (1991) at 20.

44 Several commenters oppose the implementation of mandatory industry-based lists, arguing that this alternative raises the same problems of cost, confidentiality, and obsolescence as a national database. See, e.g., comments of Bell Atlantic and CUC International. Industry-based do-not-call lists may be appropriate for smaller telemarketers who find it more economical or efficient to maintain do-not-call lists in cooperation with other telemarketers in the same region or industry. See, e.g., comments of Time Warner, Inc. (TWI). Therefore, our decision to choose the company-specific do-not-call list alternative does not preclude telemarketers from voluntarily maintaining an industry-based do-not-call list as long as that method comports with the rules set forth in § 64.1200(e) for maintaining do-not-call lists. We emphasize that, regardless of the method chosen, the person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will ultimately be held responsible for compliance with our rules. See para. 24, infra.

existing calling lists.[45] Such lists are more likely to be accurate than a national database because a single party would be responsible for recording and maintaining do-not-call requests, and that party could verify a consumer's identification with its own customer information. In sum, the company-specific do-not-call list alternative represents a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service. For these reasons, we conclude that the company-specific do-not-call list is the alternative that best accomplishes the purposes of the TCPA.

24. The comments persuade us that we must mandate procedures for establishing company-specific do-not-call lists to ensure effective compliance with and enforcement of the requirements for protecting consumer privacy.[46] See § 64.1200(e). Unlike the DMA list cited by CSC at n. 42, supra, the alternative we adopt today requires the compliance of all telemarketers engaged in telephone solicitation as defined in the TCPA. Thus, any person or entity engaged in telephone solicitation is required to maintain a list of residential telephone subscribers who request not to be called by the telemarketer.[47] The requirements will help ensure that residential subscriber privacy is protected from further undesired solicitations and will avoid the wide dissemination of information regarding a subscriber's do-not-call request. Each person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will be held ultimately responsible for maintenance of its do-not-call list and will be fully accountable for any problems arising in the maintenance and accuracy of the list.[48] Telemarketers are required to maintain do-not-call lists on a permanent basis, so that consumers will not be burdened with periodic calls to renew a do-not-call

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45 We emphasize that § 227(c)(2) prohibits the imposition of any charge on residential subscribers from procedures to protect them from unwanted solicitations.

46 See, e.g., comments of DMA.

47 Tax-exempt nonprofit organizations are not subject to this requirement because the TCPA excludes such organizations from the definition of "telephone solicitation." See § 227(a)(3). Therefore, tax-exempt nonprofit organizations need not maintain do-not-call lists.

The definition of "telephone solicitation" in § 227(a)(3) also excludes calls made to parties with whom the caller has an established business relationship and calls for which the calling party has received the called party's prior express invitation or permission. We emphasize, however, that subscribers may sever any business relationship, i.e., revoke consent to any future solicitations, by requesting that they not receive further calls from a telemarketer, thus subjecting that telemarketer to the requirements of § 64.1200(e).

48 See n. 44, supra. The TCPA enforcement mechanisms are discussed in paras. 55-56, infra.

request. Moreover, in the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.[49] Finally, § 227(C)(5) of the TCPA provides that a telemarketer's implementation, with due care, of reasonable practices and procedures in compliance with the requirements for protection of residential subscribers from unwanted telephone solicitations will be an affirmative defense to a cause of action brought regarding a violation of such requirements.[50]

25. Time of Day Restrictions. While many commenters support reasonable time of day restrictions on telemarketing calls,[51] several state that such restrictions are unnecessary because responsible telemarketers already restrict their calls to reasonable hours as a sound business practice.[52] The OPUC notes that many telemarketing complaints mention the late or unreasonable hour of the call. Several commenters urge the Commission not to adopt time of day restrictions which would conflict with the requirements of the Fair Debt Collection Practices Act (FDCPA).[53]

26. We concur with commenters that responsible telemarketers are likely to restrict their calls to reasonable hours. However, both the record and the legislative history indicate that early morning and late night telephone solicitations are a significant nuisance to telephone subscribers. In light of the record and the legislative history, we conclude that it is in the public interest to impose time of day restrictions on telephone solicitations as reasonable limitations to invasions of residential subscriber privacy. We

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49 See House Report 102-317, 102d Cong., 1st Sess., pp. 13-17 (1991).

50 The Newspaper Association of America suggests that alternative methods and procedures should be permitted for second class mail permit holders if the national database alternative is mandated, but states that separate treatment would not be necessary under the company-specific do-not-call list option. In light of our selection of the company-specific do-not-call list as the preferred alternative for limiting unwanted telephone solicitations, we do not believe that separate methods and procedures are required for small businesses, independent contractors, or holders of second class mail permits. We conclude that the benefits of company-specific do-not-call lists are the same, e.g. cost, efficiency, and effectiveness, for small entities and for holders of second class mail permits as they are for larger enterprises, and therefore these entities will be subject to the same requirements under our rules.

51 See, e.g., comments of Ameritech; CBA; and NATA.

52 See, e.g., comments of Bell Atlantic.

53 See, e.g., comments of American Collectors Association (ACA). The FDCPA prohibits calls before the hour of 8 AM and after 9 PM, local time at the called party's location. 15 U.S.C. § 1692c(1). See also paras. 36-39 infra.

concur with the commenters that any conflict between the requirements of the TCPA and the FDCPA would make compliance with both statutes confusing. Accordingly, telemarketers will be subject to the same time of day restrictions as are imposed on debt collectors under the FDCPA. These regulations will coincide with the FDCPA prohibition against calls before the hour of 8 AM and after 9 PM, local time at the called party's location. We believe that time of day restrictions will protect consumers from objectionable calls while not unduly burdening legitimate telemarketing activity.

C. Autodialers and Artificial or Prerecorded Messages

1. General Prohibitions.

27. The TCPA prohibits the use of autodialers and prerecorded messages to place calls to an emergency telephone line, to health care facilities, to radio common carrier services, and to services for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party. It also prohibits prerecorded message calls (but not autodialed calls) to residences except in emergencies or with the prior express consent of the called party. The TCPA, however, permits the Commission to exempt from the residential prohibition calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement. §§ 227(b)(2)(B). Accordingly, the NPRM proposed to exempt these calls from the residential prohibitions, as well as calls from parties with which the called party has an established business relationship and calls from tax-exempt nonprofit organizations.

28. Commenters generally support the prohibitions in the NPRM on the use of autodialers and prerecorded messages. Specifically, Centel Corporation (Centel) and Citicorp concur that the restrictions set forth in the NPRM properly balance consumer privacy concerns and legitimate telemarketing practices. Many commenters, however, request clarification regarding the scope of these prohibitions. As discussed below, we adopt the general prohibitions and the exemptions proposed in the NPRM, clarifying their scope as requested.

2. Prior Express Consent.

29. The TCPA allows autodialed and prerecorded message calls if the called party expressly consents to their use. Several commenters express concern that they would unintentionally incur liability by placing calls to individuals who provided a number at one of the "prohibited destinations" (for example, a hospital or an emergency line) as the number at which that individual could be reached.[54] Commenters note that they have no way of knowing whether numbers provided to them fall in one of the categories of destinations to which calls are prohibited, or whether such numbers have been changed without notification.[55]

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54 See, e.g., comments of American Bankers Association (ABA).

55 See, e.g., comments of BellSouth.

30. Many commenters express the view that any telephone subscriber that provides his or her telephone number to a business does so with the expectation that the party to whom the number was given will return the call. Hence, any telephone subscriber who releases his or her telephone number has, in effect, given prior express consent to be called by the entity to which the number was released.[56] Private Citizen urges the Commission to reject this interpretation and points out that some 800 numbers have the capacity to record the telephone number of an incoming call without the caller's knowledge or consent. It urges the Commission to clarify that telemarketers may not use the telephone numbers of persons who call to make inquiries without expressly requesting permission to use the number for that purpose.

31. We emphasize that under the prohibitions set forth in § 227(b)(1) and in §§ 64.1200(a)-(d) of our rules, only calls placed by automatic telephone dialing systems or using an artificial or prerecorded voice are prohibited. If a call is otherwise subject to the prohibitions of § 64.1200, persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.[57] Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached. However, if a caller's number is "captured" by a Caller ID or an ANI device without notice to the residential telephone subscriber, the caller cannot be considered to have given an invitation or permission to receive autodialer or prerecorded voice message calls. Therefore, calls may be placed to "captured" numbers only if such calls fall under the existing exemptions to the restrictions on autodialer and prerecorded message calls.

3. Exemptions to Prohibited Uses of Artificial or Prerecorded Messages.

32. Established Business Relationship. The NPRM tentatively concluded that the privacy rights the TCPA intended to protect through the prohibition on prerecorded message calls to residences are not adversely affected where the called party has or had a voluntary business relationship with the caller. Most commenters support the proposed exemption in the NPRM for calls to persons with whom the caller has a prior or existing business relationship. CSC argues that the proposed exemption is overbroad because it extends beyond current or ongoing business relationships to prior business relationships. Further, CSC contends that the TCPA intended to exempt business relationship calls only from its restrictions on live operation solicitations and not from the autodialer prohibitions. CSC maintains that, at a minimum, the Commission should require actual consent to telephone solicitations and must clearly provide a means by which consumers may terminate any such relationship.

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56 See, e.g., comments of Citicorp and J.C. Penney.

57 See House Report, 102-317, 1st Sess., 102nd Cong. (1991), at p. 13, which supports this interpretation, noting that in such instances "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."

33. In addition, we sought comment on the proper scope of this exemption and on the definition of the term "business relationship." However, comments regarding the proper definition and scope of this exemption vary widely. Many commenters concur that an existing business relationship could not be formed with a residential telephone subscriber solely on the basis of a prior solicitation.[58] Many commenters contend that the Commission should adhere to the broadest possible definition of the business relationship, rather than a narrow definition which may exclude many categories of appropriately exempted calls.[59] Other commenters suggest various factors for determining the existence of a business relationship, including an exchange of consideration; a transaction between the caller and the called party within some specified period prior to the telephone solicitation; a previous inquiry or an application made by the called party to the caller for products or services; time elapsed since last inquiry or transaction; and prior express consent by the called party to the caller for future calls.[60]

34. Although the TCPA does not explicitly exempt prerecorded message calls from a party with whom the consumer has an established business relationship, it provides an exemption for commercial calls which do not adversely affect residential subscriber privacy interests and do not include an unsolicited advertisement. We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.[61] Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships;[62] barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between businesses and their customers. Thus, we are not persuaded that the TCPA precludes the use of prerecorded messages to make solicitations to a party with whom the telemarketer has an established business relationship. In view of the support in the record for the exemption and the legislative history, we conclude that the TCPA permits an exemption for established business relationship calls from the restriction on artificial or prerecorded message calls to residences.[63] We

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58 See, e.g., comments of OPUC.

59 See, e.g., comments of ACA and AMEX.

60 See, e.g., comments of ABA and ACA.

61 See, e.g., comments of InterVoice.

62 See House Report, 102-317, 102d Cong., 1st Session (1991), p. 13.

63 We emphasize, however, that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that company's do-not-call list. A customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation. See n.

decline to create more specific business relationship exemptions as requested by several commenters, such as utility companies, in favor of an exemption broad enough to encompass a wide range of business relationships. Finally, consistent with our conclusions at para. 24 supra, we find that a consumer's established business relationship with one company may also extend to the company's affiliates and subsidiaries.[64]

35. Many commenters concur with our tentative conclusion that a business relationship should be defined broadly rather than narrowly (e.g., an exchange of consideration), but that it cannot be formed solely on the basis of a prior solicitation.[65] Based on the record in this proceeding and the legislative intent to address a broad range of business relationships in the rules, we adopt our tentative conclusion.[66] Accordingly, the rules define "established business relationship" as a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party. The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by the telemarketer.[67] A broad definition of the business relationship can encompass a wide variety of business relationships (e.g. publishers with subscribers, credit agreements) without eliminating legitimate relationships not specifically mentioned in the record. Accordingly, we reject proposals to define a business relationship by reference to consideration or to a period of time because such narrow definitions may exclude legitimate categories of business relationships.

36. Debt Collection Calls. In the NPRM, we observed that all debt

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47, supra.

64 See House Report, 102-317, 102d Cong., 1st Session (1991), pp. 13-17, noting that solicitations by persons or entities affiliated with businesses which have an established business relationship with the consumer would be permissible in certain circumstances, but that companies should honor requests not to call again notwithstanding any business relationship with the consumer.

65 See, e.g., comments of AMEX, TWI.

66 See, e.g., House Report 102-317, 102d Cong., 1st Session (1991), pp. 13-17.

67 As we noted in para. 31, supra, a party making an inquiry cannot be considered to have given prior express consent to future autodialed or prerecorded message calls simply because that party's number has been "captured" by an ANI device or similar system. Nor can a consumer inquiry be considered to create a business relationship where the consumer's number has been captured absent that consumer's express invitation or permission to be contacted at the captured number.

collection circumstances involve a prior or existing business relationship. In addition, we tentatively concluded that debt collection calls are exempt from the TCPA's prohibitions against prerecorded message calls because they are commercial calls which do not convey an unsolicited advertisement and do not adversely affect residential subscriber rights.

37. Commenters generally support an exemption for debt collection calls.[68] Commenters concur that debt collection calls are exempt as calls to parties with whom the caller has a prior or existing business relationship, and further argue that debtors have given prior express consent to such calls by incurring a debt.[69] AFSA requests the Commission to explicitly exempt calls where terms of a credit agreement are not met. Moreover, AFSA argues that debt collection calls should be exempted as commercial calls not transmitting an unsolicited advertisement and not adversely affecting privacy rights. A number of commenters urge the Commission to include language clarifying that calls made on behalf of a creditor or other entity attempting to collect a debt are exempted. CSC opposes a debt collection exemption, arguing that such an exemption would increase the potential for harassment. Other commenters maintain that prerecorded message calls are the least intrusive means of debt collection, and that elimination of this option could lead to higher transaction and loan servicing costs.[70]

38. Many commenters request clarification of the identification requirements for artificial or prerecorded voice messages because these requirements appear to conflict with the requirements of the FDCPA. The FDCPA prohibits debt collection agents from revealing the identity of the creditor or the purpose of the call to third parties, and that a debt collector determine that the called party is the debtor before revealing the purpose of the call.[71] If the call is delivered using an artificial or prerecorded voice message, the message must be fashioned so that the purpose of the call is not revealed to a third party. The TCPA, on the other hand, requires prerecorded messages to identify the individual, business, or other entity placing the call at the beginning of the message. Some commenters urge the Commission to provide

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68 See comments of ABA; American Financial Services Association (AFSA); the Coalition; Citicorp; CBA; Gannett; Household International; National Retail Federation; Teknekron; and Wells Fargo.

69 See comments of ACA; AFSA; Ameritech; Citicorp; CBA; Household International; Ohio Student Loan Commission; and Wells Fargo.

70 See comments of the Coalition; CBA; Digital Systems International; and the National Retail Federation.

71 Debt collectors subject to the FDCPA are prohibited from conveying any information to third parties, even inadvertently, with respect to the existence of a debt. 15 U.S.C. § 1629b-c. The FDCPA requires a collector initiating a call answered by a third party to identify himself by name but not to disclose the name of his employer unless asked. 15 U.S.C. § 1629b(1). See comments of ACA.

specific language for use in prerecorded messages. Other commenters simply urge the Commission not to adopt requirements which would conflict with the requirements of the FDCPA. The ABA suggests that the Commission adopt language to the effect that no requirements under § 227(d)(3) of the TCPA be deemed to preempt the requirement of other federal or state laws.

39. Upon consideration of these comments, we conclude that an express exemption from the TCPA's prohibitions for debt collection calls is unnecessary because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships. As proposed in the NPRM, these exemptions would also apply where a third party places a debt collection call on behalf of the company holding the debt. Whether the call is placed by or on behalf of the creditor, prerecorded debt collection calls would be exempt from the prohibitions on such calls to residences as: (1) calls from a party with whom the consumer has an established business relationship, and (2) commercial calls which do not adversely affect privacy rights and which do not transmit an unsolicited advertisement.[72] With respect to concerns regarding compliance with both the FDCPA and our rules in prerecorded message calls, we emphasize that the identification requirements will not apply to debt collection calls because such calls are not autodialer calls (i.e., dialed using a random or sequential number generator) and hence are not subject to the identification requirements for prerecorded messages in 64.1200(e)(4) of our rules.[73] Accordingly, we reject as unnecessary proposals that we provide specific language for use in prerecorded debt collection messages. In any event, to the extent any conflicts exist, compliance with both statutes is possible through the use of live calls.

40. Tax-Exempt Nonprofit Organizations and Non-Commercial Calls. In the NPRM, we sought comment on whether tax-exempt nonprofit organizations should be exempt from the TCPA's prohibitions on prerecorded message calls to residences either because such calls are not made for commercial purposes, or because they are commercial calls which do not adversely affect privacy interests and which do not transmit an unsolicited advertisement. See § 64.1200(a)(2). We observed that the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities. Commenters generally support the proposed exemption. However, a number of commenters object to such exemptions for calls from nonprofit organizations, arguing that such calls are also a nuisance and an invasion of privacy.[74] The legislative history of the TCPA contrasts calls made by tax-exempt nonprofit organizations with commercial calls and indicates that commercial calls have by far produced the greatest number of complaints

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72 A creditor may solicit a residential subscriber using a prerecorded message as long the established business relationship has not been previously severed by the debtor. This interpretation reflects the legislative intent expressed in House Report, 102-317, 102d Cong., 1st Session (1991), pp. 14-17.

73 See comments of ABA, ACA. See also paras. 25-26 supra.

74 See, e.g., comments of NCL and OPUC.

about unwanted calls.[75] Moreover, no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls. Accordingly, based on the comments and the legislative history of TCPA, we conclude that tax-exempt nonprofit organizations should be exempt from the prohibition on prerecorded message calls to residences as non-commercial calls. Therefore, we will not seek additional authority to curb calls by tax-exempt nonprofit organizations.

41. Some commenters urge the Commission to expressly exempt specific categories of additional organizations such as market research or polling organizations, whose activities are not invasive of residential privacy rights and were not intended to be prohibited by the TCPA.[76] We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.[77] We thus reject as unnecessary the proposal to create specific exemptions for such activities.

4. Clarifications.

42. Elderly Home. The TCPA prohibits autodialer and prerecorded message calls to "elderly homes" absent prior express consent or unless it is an emergency call. AFSA requests clarification of the term, as it appears in § 227(b)(1)(A)(ii) and in the proposed rules, § 64.1200(a)(1)(ii), noting that the term is sufficiently ambiguous to include the private homes of elderly telephone subscribers as well as health care establishments. Since the TCPA does not define the term, we must apply the plain meaning of the words in interpreting the statute. This term clearly refers to a residential setting for the elderly, but also suggests the vernacular for institutions like nursing homes and other long term health care facilities. Its placement in a section which refers to other health care facilities rather than in the following section regarding calls to residential telephone subscribers also suggests that the words are meant to describe an institutional setting in which the elderly reside, as opposed to any reference to the private homes of the elderly. Given the placement of this term in the statute and the lack of evidence in the legislative history suggesting any contrary meaning, we conclude that the words "elderly home" do not refer to the private homes of the elderly, and that the words are intended to include in the general prohibition against autodialer and

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75 See, House Report 102-317 at 16-17 stating that "most unwanted telephone solicitations are commercial in nature" and that "the two main sources of consumer problems -- high volume of solicitations and unexpected solicitations -- are not present in solicitations by nonprofit organizations." See also, Senate Report 102-177 at 6, to accompany Bill S. 1410. 102d Cong., (1991).

76 See comments of Congressman Brewster and Public Forum.

77 See para. 45, infra., emphasizing that market research or surveys would be prohibited under § 227 of the TCPA and § 64.1200(a)(1) if the called party were charged for the call without the party's prior express consent or if such calls contain unsolicited advertisements.

artificial or prerecorded voice messages calls made to health care facilities and those institutions which house primarily elderly persons.

43. Radio Common Carriers. The TCPA prohibits autodialer and prerecorded message calls to radio common carrier services or any service for which the called party is charged for the call. § 227(b)(1)(iii). The Cellular Telecommunications Industry Association (CTIA) and Centel Corporation urge the Commission to exempt from the prohibitions on autodialers and prerecorded messages those calls made by cellular carriers to cellular subscribers (as part of the subscriber's service) for which the called party is not charged. These commenters point out that cellular customers are not charged for calls which, for example, monitor service or issue warnings to "roamers" that they are moving out of the carrier's service area. Therefore, such calls should either be exempted from the prohibitions of § 64.1200 (a)(1)(iii), or should be interpreted as not intended to be prohibited by Congress.

44. In addition, West Marketing Services (West), a market research firm, states that it licenses a program, CelShare, which places calls to cellular phones to measure a cellular carrier's share of a given cellular market. The CelShare program monitors cellular telephone company messages to determine whether a random sample of telephone numbers is active or inactive. To avoid actually reaching a cellular customer, calling devices are normally used in the middle of the night, are set to two rings, and immediately disconnect if a cellular customer answers the call. West states that three live connections are made for every 1,000 calls. Since the primary function of its program is market research, and since no telemarketing is involved, West urges the Commission to allow its program to operate under the proposed rules. West notes that several states have specifically exempted its program from the definition of prohibited autodialer calls.

45. Based on the plain language of § 227(b)(1)(iii), we conclude that the TCPA did not intend to prohibit autodialer or prerecorded message calls to cellular customers for which the called party is not charged. Moreover, neither TCPA nor the legislative history indicates that Congress intended to impede communications between radio common carriers and their customers regarding the delivery of customer services by barring calls to cellular subscribers for which the subscriber is not called. Accordingly, cellular carriers need not obtain additional consent from their cellular subscribers prior to initiating autodialer and artificial and prerecorded message calls for which the cellular subscriber is not charged. However, the market research calls to cellular carriers, as conducted by the West CelShare program, are clearly prohibited absent the prior express consent of the cellular customer called. While West appears to take pains to avoid calls which will result in charges to cellular subscribers, the fact that its market research calls result in such charges and are made without prior consent from the subscribers places its service under the prohibitions of the TCPA and the rues.[78]

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78 A few commenters note that the NPRM omitted from the proposed rules the phrase "or other radio common carrier service," as it appears in §227(b)(1)(A)(iii) of the TCPA. This language was indeed inadvertently omitted from the text of the proposed rule, and has been included in

46. Voice Messaging Services. Several commenters request clarification that services which store and forward messages for later delivery to the called party are not intended to be prohibited by the TCPA or by the proposed rules.[79] In urging the Commission to create a specific exemption for such services, the commenters point to numerous statements in the legislative history in which members of Congress expressed an expectation that such services would be exempted from the prohibitions of the TCPA.[80] Bell Atlantic asserts that the intent of Congress was to restrict unsolicited advertising, not communications services which store and transmit individual customer messages. MessagePhone concurs and references the Modified Final Judgment,[81] which, inter alia, permits the regional Bell Operating Companies to engage in such services, and lends support for such an exemption. Commenters contend that the Commission has already found such services to be in the public interest, citing a recent Commission decision granting a waiver to permit the delivery of Coin Message Delivery Services,[82] which has been recently deployed by Bell Atlantic. Ameritech urges the Commission to clarify whether the prerecorded message identification requirement applies to the local operating company or the person leaving the message, or both, for messages recorded using services like the Public Telephone Message Delivery Service (PTMDS). Ameritech contends that if the person leaving the message identifies himself or herself, then further identifying information (such as a telephone number or address) is unnecessary.

47. The TCPA did not carve out a specific exemption for voice messaging services. However, the services referred to by the commenters would appear to fall either outside the TCPA's prohibitions or under an exemption. The prohibitions of § 227(b)(1) clearly do not apply to functions like "speed dialing," "call forwarding," or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion.[83] Voice messaging services used to send personal prerecorded voice

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§64.1200(a)(1)(iii) to mirror the language of the TCPA. See Appendix B.

79 See comments of Ameritech and MessagePhone.

80 See comments of Ameritech and reply comments of Ameritech at 4, n.9.

81 See United States v. American Tel. and Tel. Co., 552 F. Supp. 226 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), modified United States v. Western Elec. Co., 673 F. Supp. 525 (D.D.C. 1987), 714 F. Supp. 1 (D.D.C. 1988), affirmed in part and reversed in part 900 F.2d 283 (D.C. Cir. 1990).

82 See Bell Atlantic Order, 6 FCC Rcd at 3400, 3401 (Com. Car. Bur. 1991).

83 We emphasize that where such services are used for the purpose of telephone solicitation in violation of our rules and the TCPA, the users of the services, not the carriers providing the services, would be held liable, consistent with Congress' policy that carriers not be held responsible for the content of messages transmitted through the network. See statement of Senator Hollings, Congressional Record, S 18785 (November 27, 1991). Of course,

messages are not subject to the identification requirements of 227(d)(3) and § 64.1200(d) of our rules because such calls do not use autodialers to transmit prerecorded messages. Moreover, under the rules adopted here, artificial and prerecorded message calls to residences are exempt from the TCPA's prohibitions in an emergency, where the caller received prior express consent, or if the call is exempted by the Commission as either a non-commercial call or a commercial call which does not include an unsolicited advertisement and does not adversely affect the called party's privacy interests. Thus, Automated Alternate Billing Systems (AABS), used by common carriers to perform operator services with artificial or prerecorded voice prompts, are exempt from the prohibition against artificial or prerecorded voice calls to residences to the extent they are non-commercial calls. However, voice message calls, as prerecorded messages, would be subject to the prohibitions of § 227(b)(1) and § 64.1200(a) of our rules. Thus, voice message calls could not be directed to an emergency line, a health care facility, radio common carrier services or other services for which the called party is charged for the call except in an emergency or with the prior express consent of the called party.

48. In light of the foregoing, we believe that the prohibitions set forth in the rules are not a barrier to the continued use and expansion of voice messaging service, and that the rules adopted here will be effective in preventing any potential abuse by telemarketers. See §§ 64.1200(a)-(d). Accordingly, a specific voice messaging exemption is not necessary to permit the present and future voice messaging services.

49. Public Utilities. Many public utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes. They note that under normal circumstances, customers can continue using their telephones normally as the meter information is being gathered and forwarded to a central office. The utilities urge the Commission to exempt such calls from the autodialer prohibitions, either under the existing business relationship exemption or under the "emergency" exemption for calls related to public health and safety because information about service outages and about possible discontinuance of service affect public health and safety. Moreover, many public utilities state that they have a third party notification service for their customers, in which the utility agrees to contact a party designated by the customer in the event that a delinquent bill or a service outage threatens interruption of that customer's service. This program is designed to assist persons who have difficulty maintaining their accounts or who otherwise desire assistance in ensuring that service is not interrupted. However, several commenters express concern that a broad emergency exception could be a vehicle for campaigns targeted at the elderly, who in the past have been subjected to telemarketing calls involving vitamins, security systems, or other items purported to be important to the "health and safety" of the called party.

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carriers initiating telephone solicitations on their own behalf using such service would be subject to our rules and the TCPA.

50. BellSouth concurs with the public utilities and contends that the legislative history[84] indicates an intent to permit autodialed calls for the purpose of notifying customers of potential power outages, maintenance, or termination. In some jurisdictions, BellSouth is required by tariff to notify customers before disconnecting service. BellSouth requests the Commission to exempt from the prohibitions of § 64.1200(a)(1) autodialed calls regarding the installation, maintenance, or termination of telephone service in emergency situations. Further, Ameritech contends that the use of Automatic Meter Reading Systems by utility companies clearly satisfies the TCPA's requirements regarding prior express consent, and that such services were not intended by Congress to be prohibited.

51. Each of the circumstances described by the utilities is included within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent. Service outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public. Similarly, public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification or the call relates to a public health and safety matter. In light of the comprehensive nature of the current exemptions, a specific exemption for public utilities to the general prohibition against autodialers and artificial or prerecorded voice message calls is not required.[85]

D. Technical and Procedural Standards

1. Line Seizure - 5 Second Hang-up Requirement.

52. The TCPA requires, and the rules we adopt provide, that automatic telephone dialing systems used to transmit artificial or prerecorded messages shall automatically release the called party's line within 5 seconds of the time that the calling party's system is notified of the called party's hang-up. The ACA requests clarification of this requirement in order to ensure proper compliance. For the purposes of this rule section, the 5 second period begins when the called party's hang-up signal reaches the dialing system of the caller. Commenters generally do not indicate that they anticipate problems in complying with this requirement.[86]

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84 Congressional Record, H 11310 (November 26, 1991).

85 We emphasize that telephone solicitations as defined in our rules can never be classified as "emergencies." See § 64.1200(b).

86 Commenters point out that the proposed rules, in the prohibition against line seizure, § 68.318, refer to "automatic dialing devices," a term not employed elsewhere in the rules or the TCPA. Reading § 227(d) as a whole, it is clear that the requirement refers only to automatic telephone dialing

2. Identification Requirements for Artificial or Prerecorded Voice Systems.

53. The TCPA mandates that all artificial or prerecorded telephone messages delivered by an autodialer state clearly the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message, § 227(d)(3)(A), and we adopt this requirement in our rules, 64.1200(d). A number of commenters request that prerecorded messages be required to state the identity of the caller and the caller's telephone number (other than that of any autodialing system used to place the call) or address within 30 seconds after the message begins, so that the called party would not have to listen to the entire message before deciding whether to hang up. We reject the proposal to require that a telephone number or address be stated within 30 seconds of the beginning of an artificial or prerecorded message, because the TCPA requires only that the caller's identity be stated at the beginning of the message. See § 227(d)(3)(B). We have been presented with no evidence to persuade us to request additional authority to adopt such a restriction. Finally, as suggested by several commenters, we will require callers leaving a telephone number to provide a number other than that of the autodialer or prerecorded message player which placed the call because the autodialer or message player number may be in constant use and not available to receive calls from the called party. § 64.1200(e)(4).

3. Facsimile Machines.

54. The TCPA requires that identifying information be placed on all telephone facsimile transmissions, and that telephone facsimile machines be capable of placing such information on all transmissions. § 227(d). The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements.[87] § 227(b)(1)(C). Parties commenting on the facsimile

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systems. The title and language of that section will thus be revised to read "automatic telephone dialing systems."

87 Mr. Fax and National Faxlist urged the Commission not to impose a ban on unsolicited telephone facsimile advertisements; National Faxlist suggested that a telephone facsimile do-not-call list be created in lieu of a complete prohibition on such unsolicited advertisements. GTE requested clarification that the identification requirement does not apply to each page of messages transmitted through imaging systems.

In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra. Furthermore, the term "telephone facsimile machine" as defined in the TCPA and identically in our rules, § 64.1200(f) clearly includes imaging systems. The rules state that the

requirements for senders of facsimile messages urge the Commission to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for any violations of § 64.1200(a)(3).[88] We concur with these commenters. In the absence of "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," common carriers will not be held liable for the transmission of a prohibited facsimile message. Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987).

E. Enforcement

1. Private Right of Action.

55. The TCPA provides consumers with a private right of action, if otherwise permitted by state law or court rules, for any violation of the autodialer or prerecorded voice message prohibitions and for any violation of the guidelines for telephone solicitations. § 227(c)(5). Absent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic telephone dialing system and artificial or prerecorded voice messages. § 227(b)(3). A consumer may also file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations. § 227(c)(5). Telemarketers who have established and implemented reasonable practices and procedures in compliance with the latter section may present such compliance as an affirmative defense to any action for violation of telephone solicitation guidelines. § 227(c)(5). The TCPA also permits states to initiate a civil action in federal district court against a telemarketer who engages in a pattern or practice of violations of the TCPA. §§ 227(f)(1) and (2). States retain the power to initiate action in state court for violations of state telemarketing statutes. § 227 (f)(6). Finally, consumers may request that the Commission take enforcement action regarding violations of § 227, consistent with the Commission's existing complaint procedures.[89]

2. State Law Preemption.

56. The TCPA, in § 227(e), sets forth a standard for preemption of state

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first page or each page of a transmission to a facsimile machine must include identifying information.

88 See comments of SNET, Sprint, and reply comments of AT&T.

89 Pacific Bell asserts that complaint proceedings brought under § 208 of the Communications Act, 47 U.S.C. § 208, and based on violations of § 227 of the Act, 47 U.S.C. § 227, could only be instituted against common carriers. Pacific Bell is correct with respect to complaints filed under Section 208 of the Act. In addition to the private right of action noted above, aggrieved persons or entities may report violations of the TCPA to the Commission and request action on such violations through the informal procedures set forth in Section 1.41 of the rules, 47 C.F.R. § 1.41. See, e.g., 47 U.S.C. §§ 312 and 503(b).

law on autodialing, artificial or prerecorded voice messages, and telephone solicitations. The TCPA does not preempt state law which imposes more restrictive intrastate requirements or regulations regarding: the use of facsimile machines to send unsolicited advertisements; the use of automatic telephone dialing systems; the use of artificial or prerecorded voice messages; or the making of telephone solicitations. However, the TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages. §227 (e).

3. Other Matters

57. A number of commenters urge the Commission to request additional authority from Congress to protect consumer privacy interests, arguing that the NPRM errs on the side of protecting commercial speech and does not adequately protect telephone subscribers from invasions of privacy by telemarketers. These commenters point out that telephone subscribers must receive at least one unwanted solicitation before making a claim under the rules. The National Consumers League urges the Commission to withdraw the NPRM and begin the rulemaking process anew, stating that the Commission failed to make specific proposals for meeting the requirements of the TCPA.

58. Based upon our actions here, we find that no further authority is required at the present time to accomplish the goals of the TCPA to restrict unwanted telephone solicitations. The regulations implemented satisfy the TCPA's requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety. The record supports our conclusion that the proposed rules strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA.[90] Moreover, contrary to the allegation of the National Consumers League, the NPRM asked for comment on a variety of proposals for restricting telephone solicitations to residences and weighed their benefits, as directed by § 227(c) of the TCPA. Specific information on the various proposals was supplied in the comments and our decision is based upon the record. Accordingly, we find at this time that renewal of the rulemaking process is not warranted and would unduly delay implementation of consumer privacy protections.

59. However, we are concerned that consumers be fully informed of their rights under the TCPA. In addition to disseminating our own public notices, we will work with consumer groups, industry associations, local telephone companies, and state agencies to assure that the rules we adopt today are well publicized. We also will monitor closely any reports of alleged violations of the TCPA or the rules that are filed with the Commission to determine whether additional action is necessary to protect consumers from unwanted solicitations. If our current approach is not successful, a number of options are available. For example, we could convene a cross-industry board or

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90 See Section 2 of the TCPA.

advisory council to evaluate the complaints received and recommend effective solutions. Both Congress and the Commission have found telemarketing serves a valuable role in our economy, and it is appropriate for responsible telemarketers, who benefit from the activity, to devise solutions to problems. Alternatively, based upon our experience with the rules, it may be necessary to initiate a rulemaking proceeding to establish more stringent restrictions, or even to recommend to Congress that it increase penalties or make other statutory changes. Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing. Existing Commission procedures will permit us to continue to do so.

IV. CONCLUSION

60. This rulemaking proceeding seeks to protect consumers from automated calls which may pose a threat to health and safety as well as from unwanted solicitations. Section §64.1200(a) prohibits calls using autodialers or prerecorded messages to emergency lines, health care facilities, and calls to radio common carriers or other numbers for which the called party may be charged for the call. Prerecorded message calls to residences are generally prohibited. We have created specific exemptions to this prohibition where the record demonstrates that the calls do not adversely affect the privacy interests of residential subscribers: non-commercial calls, commercial calls not transmitting an unsolicited advertisement, calls from parties with whom a resident has an established business relationship, and calls from tax-exempt nonprofit organizations. Finally, residential subscribers will be protected from unwanted telephone solicitations by the requirement that telemarketers maintain do-not-call lists for any telephone solicitations.

V. PROCEDURAL MATTERS

61. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Report and Order is as follows:

I. Need and purpose of this action:

This Report and Order amends Part 64 of the Commission's rules by adding § 64.1200 to restrict the use of automatic telephone dialing systems and artificial or prerecorded voice messages for telemarketing purposes or for transmitting unsolicited telephone facsimile advertisements. The rules require that persons or entities making telephone solicitations establish procedures to protect residential subscribers from unwanted solicitations, and set forth exemptions to certain prohibitions under this Part. The Report and Order also amends Part 68 of the rules by revising § 68.318(c)(2) and adding § 68.318(c)(3) to require that automatic telephone dialing systems delivering a recorded message release the called party's line within 5 seconds of

notification of hang-up by the called party, and to require that telephone facsimile machines manufactured on and after December 20, 1992 must clearly identify the sender of a facsimile message. The amendments implement the Telephone Consumer Protection Act of 1991, which, inter alia, adds Section 227 to the Communications Act of 1934, as amended, 47 U.S.C. Section 227. The rules are intended to impose reasonable restrictions on autodialed or prerecorded voice telephone calls consistent with considerations regarding public health and safety and commercial speech and trade, and to allow consumers to avoid unwanted telephone solicitations without unduly limiting legitimate telemarketing practices.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM in this proceeding requested comments on proposed regulations implementing the TCPA and comments on several proposals restricting telephone solicitations to residential telephone subscribers. The Commission has considered all comments and has adopted regulations to implement the prohibitions and technical requirements mandated by the TCPA as well as regulations which allow consumers to avoid unwanted telephone solicitations through placement on company-specific do-not-call lists. The Commission considers its Report and Order to be the most reasonable course of action under the mandate of Section 227 of the Communications Act, as amended.

VI. ORDERING CLAUSES

62. Accordingly, It Is Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205, 218, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 227, Parts 64 and 68 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B hereof, effective December 20, 1992.

63. It Is Further Ordered, that, the Secretary shall cause a summary of this Report and Order to be published in the Federal Register which shall include a statement describing how members of the public may obtain the complete text of this Commission decision. The Secretary shall also provide a copy of this Report and Order to each state utility commission.

64. It Is Further Ordered, that, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Comments

Aberdeen American News
Alpha Information
Altoona Mirror
American Bankers Association (ABA)
American Civil Liberties Union
American Collectors Association * (ACA)
American Council of Life Insurance and the National Association of Life Underwriters
American Express Company *(AMEX)
American Financial Services Association *(AFSA)
American Newspaper Publishers Association * (Reply Comments by Newspaper Association of America)
American Resort Development Association
American Service Telemark
American Telemarketing Association, Inc. (ATA)
Ameritech Operating Companies *(Ameritech)
Amway
Ann Arbor News
Annenberg School for Communications
Argus Leader
Arizona Republic/Phoenix Gazette
Association of National Advertisers, Inc.
Asheville Citizen-Times
American Telephone and Telegraph Company * (AT&T)
Audio Technica
Avon
Baltimore Gas and Electric Company
Baltimore Sun
Banc One Corporation, California Bankers Clearing House Association, First USA Bank, New York Clearing House Association, QVC Network, VISA U.S.A., Inc.* (the Coalition)
Bell Atlantic
BellSouth *
Bellingham Herald
Bellville News-Democrat
Blue Cross & Blue Shield
Brazosport Facts
Brewster, Congressman Bill J. **
Buchan MD, Janet H. and Robert R. C.
Bucks County Courier Times (Mark Gursky)
Bucks County Courier Times (Arthur E. Mayhew)
California Department of Justice
California Public Utilities Commission
Capital Newspapers
Cellular Telecommunications Industry Association
Centel Corporation (Centel)
Center for the Study of Commercialism *(CSC)

Centre Daily Times
Chico Enterprise-Record
Citicorp *
Clark County Rural Electric Cooperative
CMS A/R Services
Coalition of Higher Education Assistance Organizations
ComCast Cellular **
Community Benefits Corporation
Conservation Fund
Consumer Action *
Consumer Bankers Association (CBA)
Contractors Clearing House
Courier-Journal
Cox Enterprises, Inc. (Cox)
CUC International, Inc.
CUNA Mutual Insurance Group
Daily News, Bowling Green, KY (Pipes Gaines)
Daily News, Lebanon, PA (Blake L. Sanderson)
Daily News, Los Angeles, CA (Kirk Felgenhauer)
Daily News, Los Angeles, CA (Lynne Hanchett)
Daily News, Los Angeles, CA (Chuck Schussman)
Detroit Newspaper Agency
Digital Systems International, Inc. *
Direct Marketing Association *(DMA)
Direct Selling Association
Electronic Information Systems, Inc.
Firelands Rural Electric Cooperative, Inc. **
Florida Today/USA Today
Forum
Franklinton Financial
Free Press Standard
Gadsden Times
Gannett Co., Inc. *
Gazette Printing Company
Gleaner
Goshen News
Grand Island Independent
Grand Rapids Press
Green Bay Press
GTE Service Corporation (GTE)
Guam Attorney General
Hartford Courant
Household International *
Huntsville Times
Idaho State Journal
Illinois Student Assistance Commission
Illinois, University of
Indianapolis Star, Indianapolis News
Independent Telecommunications Network, Inc. *(ITN)
Infiniti Group, Inc.
International Communications Association *
International Telesystems Corporation

InterVoice
Inventures
Investor's Business Daily
ITI Marketing Services, Inc.
Investment Company Institute
J. Blenkarn Systems
J. C. Penney Company, Inc.
Jersey Journal
Johnstown Tribune Publishing Company
Jones Intercable **
Journal and Courier
Kalamazoo Gazette/Weekly Gazette, Hometown Gazette
Kauffman Group
King TeleServices
Knight Ridder, Inc.
La Crosse Tribune
Lansing State Journal
LCS Direct Marketing Services
Lee County Electric Cooperative, Inc.
Lejeune Associates of Florida * (Lejeune)
Mary Kay Cosmetics
MENA America Bank, N.A.
MCI Telecommunications Corporation *
Merrill Lynch, Pierce, Fenner & Smith, Inc.
MessagePhone, Inc. *
Metrocall
Midland Daily News
Minnesota Attorney General
Mktg. Inc. **
Mobile Press Register
Montgomery Advertiser, Alabama Journal
Morning Call (Donald J. Belasco)
Morning Call (Richard E. Forgay II)
Mr. Fax *
Muskegon Chronicle
National Association of Realtors
National Association of Water Companies
National Consumers League (NCL)
National FaxList
National Retail Federation (NRF)
National Rural Electric Cooperative Association *
National Telephone Cooperative Association (NTCA)
NationsBank
New Haven Register
News and Observer
Newspaper Association of America ** (Initial Comment by American Newspaper Publishers Association)
New York Department of Public Service *
New York State Consumer Protection Board **
New York Times
Newsday
NonProfit Group **

North American Telecommunications Association (NATA)
Norwest Card Services
Nynex Telephone Companies
Ohio Newspaper Association
Ohio Public Utilities Commission (OPUC)
Ohio Student Loan Commission
Olan Mills, Inc. *
Oregonian
Orlando Sentinel
Pacesetter Corporation
Pacific Bell, Nevada Bell *(Pacific Bell)
Palm Beach Post
Pennsylvania Newspaper Publishers' Association
Pueblo Chieftain
Pierce-Pepin Electric Cooperative
Pioneer Electric Cooperative
Pitney Bowes **
Plain Dealer
PNC Financial Corporation
Press Journal
Princeton Packet, Inc.
Privacy Times
Private Citizen, Inc. * (Private Citizen)
Public Forum **
Record Journal Publishing
Reese Brothers, Inc.
Review
RMH Telemarketing
Rochester Telephone Corporation
Rocky Mountain BankCard System
SafeCard Services, Inc. * (Safecard)
San Francisco Newspaper Agency
Santa Barbara News-Press
Santa Cruz, County of
Santa Monica, City of **
Scottsdale Progress
Sears, Roebuck and Co.
Securities Industry Association * (SIA)
Sentinel-Record
Shotten III, Bert K.
Southern New England Telephone Company *(SNET)
Southwestern Bell Telephone Company *(SWBT)
Spokesman-Review, Spokane Chronicle
Sprint *
Star-Ledger
Stockton Record
Student Loan Marketing Association *
Sun, The
Syracuse Herald-Journal, Post-Standard, Herald American
Tampa Tribune
Tandy Corporation **
Teknekron Infoswitch Corporation

Telecheck Services
Telegram & Gazette
Telemarketing Magazine **
Telocator, the Personal Communications Industry Association
Texarkana Gazette
Texas Public Utilities Commission *
Thomas Construction *
Thomasville Times-Enterprise
Time Warner Inc. *
Times-Picayune
Union-News, Sunday-Republican
Unisys
United Electric Cooperative, Inc.
United States Postal Service **
United States Telephone Association
United Student Aid Funds, Inc. **
U.S. Intelco Networks, Inc.
U.S. West Communications, Inc. (U.S. West)
USAA Federal Savings Bank
Utilities Telecommunications Council
Vanguard Cellular Systems, Inc.
Verde Independent
Vermont Public Service Board **
Victoria Advocate
Waco Tribune
Wachovia
Washington State Attorney General
Wells Fargo Bank
West Marketing Services
Western Express Service Company
Wisconsin, State of, Department of Justice
Worcester Telegram & Gazette
Zacson Corporation

* also filed reply comments
** filed only reply comments

APPENDIX B

Title 47 of the Code of Federal Regulations, parts 64 and 68, are amended as follows:

1. The table of contents for part 64 is amended by adding subpart L to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

2. The authority citation for subpart L is added to part 64 to read as follows:

Authority: 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, and 227.

3. Subpart L is added to part 64 to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery Restrictions.

(a) No person may

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c).

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of § 64.1200(a) the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in § 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made for a commercial purpose,

(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) to any person with whom the caller has an established business relationship at the time the call is made, or

(4) which is a tax-exempt nonprofit organization.

(d) All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) or address of such business, other entity, or individual.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber (1) before the hour of 8 A.M. or after 9 P.M. (local time at the called party's location), and (2) unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) Training of personnel engaged in telephone solicitation. Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive

calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call.

(v) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a do-not-call list for the purpose of any future telephone solicitations.

(f) As used in this section:

(1) The terms "automatic telephone dialing system" and "autodialer" mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (i) to any person with that person's prior express invitation or permission, (ii) to any person with whom the caller has an established business relationship, or (iii) by a tax-exempt nonprofit organization.

(4) The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

4. The authority citation for subpart D of part 68 is revised to read as follows:

Authority: 47 U.S.C. §§ 151, 154, 155, 201-205, 218, 227, and 303.

5. Section 68.318(c) is amended by revising paragraph (c)(2) and adding paragraph (c)(3) to read as follows:

§ 68.318 Additional limitations.

* * * * *

(c) * * *

(2) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(3) Telephone facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message.

September 17, 1992

STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CC Docket No. 92-90).

This item adopts regulations to implement the prohibitions and technical requirements mandated by the Telephone Consumer Protection Act (TCPA) of 1991. This item also establishes regulations which allow consumers to avoid unwanted telephone solicitations through the placement on company specific do-not-call lists.

In crafting these provisions I was mindful of the need to strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as a paramount concern in enacting the 1991 Act. I believe the proposed requirements balances the objectives of protecting customers from nuisance calls while permitting legitimate telemarketing practices.

In particular this item prohibits calls using autodialers or prerecorded messages to emergency and health care facilities. Prerecorded messages to residences would be prohibited. This Order also establishes mandatory guidelines for telemarketers regarding the maintenance of company specific do-not-call lists. These guidelines will require a written policy, training of customer representatives regarding do-not-call policy and procedures and other related requirements. I believe that the current record clearly supports the company-specific do-not call lists as the most effective, most easily implemented and the least costly of the methods proposed to curb unwanted telephone solicitations.

It is my expectations that the proposed rules will have a significant impact in curtailing intrusive nuisance calls by telemarketers. I will be monitoring these rules closely to make sure that they adequately protect consumers from unwanted calls.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 92-1658
December 15, 1992

ARMIS FILING REQUIREMENTS

Recent ARMIS filings have revealed the need for clarification or emphasis of several Commission requirements for parties who report to the Commission, either under ARMIS or under other reporting procedures. We are issuing this Public Notice in order to assist all filing carriers in preparing correct and accurate filings.

1. Carriers should not act upon requests for waiver until waivers are granted. It is important that carriers be aware that waivers are not in effect until they are granted, in writing, by the Commission or under delegated authority.

2. Requests for waiver must be timely submitted. Requests received less than 72 hours prior to a filing date are prima facie unreasonable.

3. Carriers must obtain waivers to report ARMIS data in a manner that does not comply with Commission rules. Any data filed pursuant to waiver must be properly footnoted. Explanatory footnotes will decrease the number of requests for refilings and/or explanations of the data, thus saving time and money for both the carriers and the Commission. Instructions for entering footnotes in filings are found in the ARMIS Reporting Procedures and in the Automated and Paper Specifications for filing ARMIS data.

4. Where footnotes are required, those footnotes must be provided. For example, carriers filing Report 43-05, Table IVA, column (t), and entering code 15 ("other/unknown") must footnote this data entry pursuant to the instructions for populating column (t).

5. Rounding conventions for each specific ARMIS report must be followed when filing that report. For example, FCC Report 43-01 requires that access lines be reported in whole numbers, while FCC Report 43-04 requires that access lines be rounded to the nearest thousand. Observance of these rounding conventions will increase the reliability of data, and decrease the number of refilings needed.

6. Requests for extensions of filing time must be made in a timely manner. Requests received less than 72 hours prior to a filing date are prima facie unreasonable.

7. ARMIS filings are certified by a company officer to be accurate and correct. This requirement of certification imposes a heavy burden on filing

carriers -- a burden that carriers must address by increasing the care with which they prepare and review data for filing in ARMIS. Carriers are also under a legal obligation to correct any erroneous data filed under ARMIS. This obligation is not limited to errors found by Commission staff, but extends to errors found by the filing parties themselves or by other users of the data.

8. All data corrections in ARMIS resubmissions must be referenced in the Erratum records, as illustrated in the various ARMIS Orders.

9. Attached are modified filing requirements for Reports 43-05, 43-06, and 43-07. Instructions that have been added or changed are shown in boldface. These modifications are effective as of the March 31 and April 1, 1993 filings.

10. Also attached are specifications for filing of switch downtime data, Report 43-05, Table IV.A, as specified in a Public Notice of July 7, 1992, 7 FCC Rcd 4632 (Com.Car.Bur. 1992).

Parties having questions about, or seeking clarification of, any of the contents of this Public Notice may contact Jane Frenette, Accounting & Audits Division, at tel. (202) 634-1861, fax (202) 632-0529.

-FCC-

ATTACHMENT

This document provides the instructions for FCC Report 43-05, the ARMIS Service Quality Report, which was adopted by the Commission in CC Docket No. 87-313. The instructions consist of the following sections, which are attached.

1. Reporting Procedures - details on the specific procedures to be followed when submitting this report to the Commission.

2. Report Definition - an illustration of the rows and columns to be reported and their definitions.

3. Automated Report Specifications - revisions to the detailed automated data processing (ADP) specifications for the automated report to be filed.

A. Introduction

This document contains details on the specific procedures to be followed when submitting FCC Report 43-05, the ARMIS Service Quality Report, to the Commission.

B. General Information

1. FCC Report 43-05 was adopted by the Commission in the LEC Price Cap Order, Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990). This report is prescribed for every local exchange carrier for whom price cap regulation is mandatory and for every local exchange carrier that elects to be covered by the price cap rules.

2. Affected carriers shall file by March 31, June 30, September 30, and December 31 of each year the report for the previous calendar quarter.

3. The report shall be filed on a study area (Jurisdiction) basis.

4. Each report and diskette must be clearly labeled to include the report number, company, study area, period, COSA code, version and submission number. The report number is 43-05, which identifies the filing as the ARMIS Service Quality Report. The period identifies the year and quarter covered by the data. See the attached COSA Code Table (CO = Company, SA = Study Area) for a list of companies and their respective COSAs. The version refers to whether the filing is confidential, Public or unrestricted. The submission number is defined as follows: Submission 0 is for test data purposes only. Submission 1 is the first submission of a quarter's data. Higher numbers (2, 3, etc.) **must** be used **when filing** successive revisions to correct that quarter's submission. **All corrective submissions must be filed in both paper and diskette with the Accounting and Audits Division, the Industry Analysis Division and Downtown Copy Center.**

5. All correspondence and pleadings shall identify the proceeding as CC Docket No. 87-313.

Where to file

1. Carriers submitting FCC Report 43-05 should consult the schedule below which details the number of copies required and the location to which those copies should be delivered.

2. Carriers are reminded that they must serve a copy of both the paper report and the automated report (diskette) on the FCC's contractor for public records duplication, Downtown Copy Center at 1114 21st Street, N.W., Washington, D.C. 20036 or Room 246 at FCC Headquarters, 1919 M Street., N.W., Washington, D.C. 20036.

NUMBER OF COPIES

	Trans-mittal Letter	Paper Report	Automated Report (diskette)
FCC Secretary Room 222 1919 M Street, N.W. Washington, D.C. 20554	1	-	-
FCC Common Carrier Bureau Accounting & Audits Division Room 812 2000 L Street, N.W. Washington D.C., 20554	1	1	1
FCC Common Carrier Bureau Industry Analysis Division Room 538 1919 M Street, N.W. Washington, D.C. 20554	1	1	1
Downtown Copy Center Room 246 1919 M Street, N.W. Washington, D.C. 20036	1	1	1

D. Footnotes

1. If any data for the current period differs materially from that for the previous period or the corresponding period of the preceding year and the difference is not self-explanatory but was caused by unusual circumstances, then include footnote text to explain the specific circumstances.

2. If the reporting carrier does not follow the procedures described in the row and column instructions of the attached Report Definition, it must explain any deviations from those procedures.

3. Do not include explanatory footnotes in the transmittal letter. The footnote text must be included in the Footnote Text Records and the Footnote Table as specified in the Automated Report Specifications.

E. Errata

1. Carriers are under a legal obligation to correct any erroneous data discovered in FCC Report 43-05. Submissions containing corrected data must include references to indicate which data items were corrected since the previous submission.

2. Those reference must be included in the Erratum Records and the Erratum Table as specified in the Automated Report Specifications.

F. Certification

1. Carriers must certify the accuracy of the data submitted in FCC Report 43-05 by including a signed certification statement as the last page of the paper report.

2. The text of the certification statement is included on page 21 of 21 in the attached report definition

G. Waivers

1. If a carrier determines that it will be unable to provide data required by FCC Report 43-05, it must file an application for waiver with the Commission following established Commission procedures. All such requests from a carrier should be included in a single application. The application must demonstrate good cause for reporting a different or lower level of detail and indicate how these deficiencies will be corrected.

2. Omission of individual data items or entries, without request for waiver, is unacceptable. One reason that compliance with the full requirements is so important is that omission of any single data entry by any carrier will jeopardize the accuracy of aggregate industry information.

H. Public Information

1. The paper reports filed as Report 43-05 may be examined by the public from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., Monday through Friday, in Room 812, 2000 L Street, N.W., Washington, D.C.

2. Copies of the paper or automated reports filed as Report 43-05 may be contained from the FCC's contractor for public records duplication, Downtown Copy Center at (202) 452-1422.

For further information regarding these procedures, contact:

Barbara Van Hagen
FCC Common Carrier Bureau
Accounting & Audits Division
(202) 634-1861

Approved by OMB
3060-0395
Expires 05/31/94
Estimated Burden Hours Per Response: 833 hours

SUMMARY

This document provides the Report Definition for FCC Report 43-05, the ARMIS Service Quality Report which must be provided quarterly by study area. It contains the following:

	PAGE
Table I - Installation Intervals Table	3
Table II - Repair Intervals and Trouble Reports Table	4
Table III - Trunk Blockage Table	5
Table IV - Total Switch Downtime Table	6
Table IV.A - Occurrences of Two Minutes or More Duration Down	7
Table V - Service Quality Complaints Table	10
Table I - Row Instructions	11
Table II - Row Instructions	12
Table III - Row Instructions	13
Table IV - Row Instructions	13
Table IV.A - Row Instructions	14
Table V - Row Instructions	14
Table I - Column Descriptions	16
Table II - Column Descriptions	16
Table III - Column Descriptions	17
Table IV - Column Descriptions	17
Table IV.A - Column Descriptions	18
Table V - Column Descriptions	19
Certification	21

All percentage amounts must be entered in percent and rounded to 2 decimal places. All minutes, **days and hours** must be rounded to the nearest tenth. Number of Access Lines must be rounded to the nearest thousand, **with the exception of Table IV.A,** which must be entered in whole numbers. All number of orders, circuits, trouble reports, no trouble found, trunk groups, switches, complaints, and incidents must be entered in whole numbers. All other amounts must be rounded to the nearest thousand.

All fields must be populated. If there are no data applicable to a field, enter zero in that field. **See Data Entry Convention, No. 5, in the Automated Report Specifications.** If a filing carrier has a waiver applicable to a certain field, enter zero in that field and footnote the reason for entering zero.

Do not include explanatory footnotes in the transmittal letter; such notes must be included in the Footnotes section of the filing.

NOTICE: The ARMIS Service Quality Report collects data designed to capture trends in service quality under price cap regulation and improves and standardizes existing reporting requirements for this purpose. The ARMIS Service Quality Report specifies information requirements in a consistent format and is essential to the FCC to monitor service quality under price cap regulation. Your response is mandatory.

Public reporting burden for this collection of information is estimated to average 833 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

FCC Report 43-05
ARMIS QUARTERLY SERVICE QUALITY REPORT

Approved by OMB
3060-0395
Expires 05/31/94

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

xxxxxxxxxxxx VERSION
SUBMISSION x
TABLE I

TABLE I - INSTALLATION AND REPAIR INTERVALS
(Interexchange Access)

Row	Classification	Column		
		Switched Access	Special Access	
			High Speed Special Access	All Special Access
		(a)	(b)	(c)
	INSTALLATION INTERVALS:			
0110	Total Number of Orders or Circuits		N/A	
0112	% Commitments Met		N/A	
0113	Average Missed Commitment		N/A	
	REPAIR INTERVALS:			
0120	Total Trouble Reports			
0121	Average Interval			

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE II
COSA: xxxx

TABLE II - INSTALLATION AND REPAIR INTERVALS
(Local Service)

Row	Classification	Column						
		Residence			Business			
		MSA	Non-MSA	Total	MSA	Non-MSA	Total	Total
		(d)	(e)	(f)	(g)	(h)	(i)	(j)
	INSTALLATION INTERVALS:							
0130	Installation Orders							
0132	% Commitments Met							
0133	Avg Missed Commit							
	REPAIR INTERVALS:							
0140	Total Access Lines							
0141	Init Trouble Reports							
0142	Rep Trouble Reports							
0143	No Trouble Found							

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

TABLE III - TRUNK BLOCKAGE

Row	Classification	Column		
		Month 1	Month 2	Month 3
		(k)	(l)	(m)
0180	Total Trunk Groups			
0181	Groups Measured			
0182	Groups Exceed Threshhold 3Mos			
0183	Groups Exceed Threshhold 1 Mo			
0184	Groups Exceed Objectives 3Mos			

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

TABLE IV - TOTAL SWITCH DOWNTIME

Row	Classification	Column					
		Total Number Switches (n)	No Switch Downtime (o)	Total Switch Downtime (p)	Incidents Under 2 (q)	Number Unscheduled (r)	Percent Unscheduled (s)
0200	MSA						
0201	Non-MSA						
0210	Switches Under 1000 Lines						
0211	Switches 1000-4999 Lines						
0212	Switches 5000-9999 Lines						
0213	Switches 10000-19999 Lines						
0214	Switches Over 20,000 Lines						

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE IV.A
COSA: xxxx

TABLE IV.A - OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME

Row	Cause (t)	Switch by CLLI (u)	Access Lines (v)	MSA (w)	Duration (x)	Date (xx)	Time (yy)
0220							
0221							
0222							
0223							
0224							
0225							
0226							
0227							
0228							
0229							
0230							
0231							
0232							
0233							
0234							
0235							
0236							
0337							
0238							
0239							
0240							
0241							
0242							
0243							
0244							
0245							
0246							
0247							
0248							
0249							
0250							
0251							
0252							
0253							
0254							

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

TABLE IV.A - OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME

Row	Cause (t)	Switch by CLLI (u)	Access Lines (v)	MSA (w)	Duration (x)	Date (xx)	Time (yy)
0255							
0256							
0257							
0258							
0259							
0260							
0261							
0262							
0263							
0264							
0265							
0266							
0267							
0268							
0269							
0270							
02371							
0372							
0273							
0274							
0275							
0276							
0277							
0278							
0279							
0280							
0281							
0282							
0283							
0284							
0285							
0286							
0287							
0288							

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE IV.A
COSA: xxxx

TABLE IV.A - OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME

Row	Cause (t)	Switch by CLLI (u)	Access Lines (v)	MSA (w)	Duration (x)	Date (xx)	Time (yy)
0289							
0290							
0291							
0292							
0293							
0294							
0295							
0296							
0297							
0298							
0299							
0300							
0301							
0302							
0303							
0304							
0305							
0306							
0307							
0308							
0309							
0310							
0311							
0312							
0313							
0314							
0315							
0316							
0317							
0318							
0319							

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

TABLE V - SERVICE QUALITY COMPLAINTS

Row	Classification	Column		
		Total	MSA	Non-MSA
		(y)	(z)	(aa)
0320	No Business Access Lines			
0321	Fed Complaints Bus Users			
0322	State Complaints Bus Users			
0330	No Residential Access Line			
0331	Fed Complaints Res Users			
0332	State Complaints Res Users			

Quarterly Service Quality Report

General Instructions

For the purposes of this report, the terms switch, switching entity and entity are used interchangeably. The terms access lines, lines and lines in service are also used interchangeably. Switch counts are updated quarterly and access line counts are updated annually, representing year end counts.

Row Instructions

Table I

Row 0110 - Total Number of Orders or Circuits - Enter the total number of installation orders or circuits from Interexchange carriers/customers for the current reporting period on this row. This amount excludes installation orders not completed by the commitment date because the customer was not prepared to receive service on that date. If circuits are entered instead of the number of installation orders, disclose this information in a footnote to this row. **Enter in whole numbers.**

Row 0112 - % Commitments Met - Enter the percentage of commitments met during the current reporting period on this row. This amount is calculated by dividing the number of installation orders or circuits from Interexchange carriers/customers completed by commitment date by the total number of installation orders or circuits (row 0110). NOTE: The commitment dates for various kinds of installations are published by the LECs and must be kept on file with the Commission. Commitment dates may be extended at the customer's request. **Enter in percent, rounded to 2 decimal places.**

Row 0113 - Average Missed Commitment - Enter the average interval, expressed in calendar days, between the commitment date and the day the service or order for Interexchange carriers/customers was completed, for all commitments not met during the current reporting period on this row. If a carrier is unable to report this amount in calendar days, business days may be entered and so footnoted. **Round to the nearest tenth.**

Row 0120 - Total Trouble Reports - Enter the total number of circuit specific trouble reports referred to the LEC by interexchange carriers/customers during the current reporting period. **Enter in whole numbers.**

Row 0121 - Average Interval - Enter the average interval, in hours to the nearest tenth, from the time of the reporting carrier's receipt of the trouble report to the time of acceptance by the complaining interexchange carrier/customer.

Table II

Row 0130 - Installation Orders - Enter the total number of installation orders, or circuits, for local service customers for the current reporting period. This amount excludes installation orders not completed by the commitment date because the customer was not prepared to receive service on that date. If circuits are entered instead of the number of installation orders, disclose this information in a footnote to this row. **Enter in whole numbers.**

Row 0132 - % Commitments Met - Enter the percentage of commitments met during the current reporting period on this row. This amount is calculated by dividing the number of installation orders completed by commitment date by the total number of installation orders (row 0130). **Enter in percent, rounded to 2 decimal places.**

Row 0133 - Average Missed Commitment - Enter the average interval, expressed in calendar days, between the commitment date and the day the service or order was completed, for all commitments not met during the current reporting period on this row. If a carrier is unable to report this amount in calendar days, business days may be entered and so footnoted. **Round to the nearest tenth.**

Row 0140 - Total Access Lines - Access lines include all classifications of local exchange telephone service including, but not limited to, individual lines, party line access, PBX access, Centrex access, Coin access, Foreign Exchange access and WATS access. Access lines, as defined herein, is a more inclusive term than billable access lines as defined in ARMIS 43-01 and 43-04 reports. See row instructions for rows 2090 through 2140 of the ARMIS 43-01 Report and row 9010 of the ARMIS 43-04 Report for the definition of billable access lines. **Round to the nearest thousand.**

Row 0141 - Initial Trouble Reports - Enter the number of trouble reports (complaints concerning service quality mad by customers or end users to LECs) received by the reporting carrier during the current reporting period. **Enter in whole numbers.**

Row 0142 - Repeat Trouble Reports - Enter the number of repeat trouble reports (complaints concerning service problems that recur, or remain unresolved, within thirty days of the initial trouble report) received by the reporting carrier during the current reporting period. **Enter in whole numbers.**

Row 0143 - No Trouble Found - No trouble found refers to a trouble report investigation which finds no discernible problem. Enter the number of investigations which found no problem during the current reporting period. **Enter in whole numbers.**

Table III

Row 0180 - Total Trunk Groups - Enter the total number of common trunk groups for which the reporting carrier is responsible. Common trunk groups are trunk groups between the LEC end office and the LEC access tandem that carry Feature Group B, C and D access traffic. IntraLATA traffic may also be carried on these groups. **Enter in whole numbers.**

Row 0181 - Groups Measured - Enter the number of common trunk groups measured during the current reporting period on this row. **Enter in whole numbers.**

Row 0182 - Groups Exceeding Servicing Threshold for Three Months - Enter the number of common trunk groups which have exceeded the reporting carrier's interstate access tariff measured blocking threshold for three or more consecutive months. Trunk group servicing thresholds have been discussed in the Interexchange Carriers Compatibility Forum (ICCF) and T1Q1 Industry Forum, and are included in tariffs kept on file with the Commission. Servicing thresholds are set to indicate that there is a statistical probability that blockage is exceeding the designed blocking objective whenever such thresholds are exceeded. Servicing thresholds are generally set at 2 percent blocking for equal access trunks, and at 3 percent blocking for non-equal access trunks. The reporting carrier must disclose its thresholds in a footnote to this row. The reporting carrier must also disclose changes in its thresholds, if any, in a footnote to this row. **Enter in whole numbers.**

Row 0183 - Groups Exceeding Servicing Threshold for One Month - Enter the number of common trunk groups which have exceeded the reporting carrier's interstate access tariff measured servicing threshold for the current month. **Enter in whole numbers.**

Row 0184 - Groups Exceeding Design Blocking Objectives for Three Months - Enter the number of common trunk groups which have exceeded equipment design blocking objectives for three or more consecutive months. Design blocking objectives range from 0.5 percent to 1.0 percent of traffic in the time-consistent busy hour of the busy season. Reporting carriers must specify their design blocking objectives in a footnote to this row. **Enter in whole numbers.**

Table IV

Row 0200 - MSA - This row represents all MSAs served within the study area. MSAs, or Metropolitan Statistical Areas, are designated by the Department of Commerce in a list released following each decadal census. An MSA includes at least one city with a minimum population of 50,000, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See 45 Fed. Reg. 956 (1980). **Use the rounding conventions specified in the column instructions when entering these data.**

Row 0201 - Non-MSA - This row represents all areas in the study area which lie outside of any MSA. **Use the rounding conventions specified in the column instructions when entering these data.**

Row 0210 - Switches Under 1,000 Lines - Enter the number of switches, and associated data, serving fewer than 1,000 access lines. **Use the rounding conventions specified in the column instructions when entering these data.**

Row 0211 - Switches with 1,000 to 4,999 Lines - Enter the number of switches, and associated data, serving 1,000 to 4,999 access lines. **Use the rounding conventions specified in the column instructions when entering these data.**

Row 0212 - Switches with 5,000 to 9,999 Lines - Enter the number of switches, and associated data, serving 5,000 to 9,999 access lines. **Use the rounding conventions specified in the column instructions when entering these data.**

Row 0213 - Switches with 10,000 to 19,999 Lines - Enter the number of switches, and associated data, serving 10,000 to 19,999 access lines. **Use the rounding conventions specified in the column instructions when entering these data.**

Row 0214 - Switches with 20,000 and over Lines - Enter the number of switches, and associated data, serving 20,000 or more access lines. **Use the rounding conventions specified in the column instructions when entering these data.**

NOTE: The sum of rows 0200 and 0201 equal the sum of rows 0210 through 0214.

Table IV.A

Rows 220 through 319 - Each of these rows is provided for entry of one occurrence of switch downtime of two or more minutes in duration. For each occurrence use one row, entering the appropriate data in the columns provided. We have assumed that no carrier will have more than 100 occurrences in a reporting quarter. If such events exceed 100 occurrences, enter the appropriate data for the remaining occurrences in a footnote to row 319. **Include only those rows with data to be reported, but complete every item in those rows. Use the rounding conventions specified in the column instructions when entering these data.**

Table V

Service Quality Complaints - Service quality complaints are complaints pertaining to service quality **filed with state or federal regulatory authorities.** This term does not include complaints relating to billing, operator service providers, 900 or 976 services. **Enter in whole numbers.**

Row 0320 - Number of Business Access Lines - Enter the total number of business access lines as of December 31 of the previous calendar year (in thousands) in the study area on this row.

Row 0321 - Federal Complaints from Business Users - Federal complaints are complaints filed with this Commission. Enter the number of federal complaints filed by business users on this row. **Enter in whole numbers.**

Row 0322 - State Complaints from Business Users - State complaints are complaints filed with state regulatory agencies. Enter the number of state complaints filed by business users on this row. **Enter in whole numbers.**

Row 0330 - Number of Residential Access Lines - Enter the total number of residential access lines as of December 1 of the previous calendar year (in thousands) in the study area on this row.

Row 0331 - Federal Complaints from Residential Users - Enter the number of federal complaints filed by residential users on this row. **Enter in whole numbers.**

Row 0332 - State Complaints from Residential Users - Enter the number of state complaints filed by residential users on this row. **Enter in whole numbers.**

Service Quality Report

Column Descriptions

Table I

Column (a) -Switched Access - Circuit from the local exchange carrier (LEC) office to the interexchange carrier/customer Point of Presence (POP) for Feature Group B, C or D interstate service.

Special Access - Circuit from the LEC facilities to the interexchange carrier POP or customer premises for voice grade service, WATS/800, metallic and telegraph services, audio or video program services, wideband services, DDS, high capacity, DS1, DS3, and switched Feature Group A services.

Column (b) - High Speed Special Access - Circuit from the LEC facilities to the interexchange carrier POP or customer premises for DS1, DS2, DS3 and other similar digital services.

Column (c) - All Special Access - Enter all special access data, including those entered in column (b), in this column .

Table II

Residence - Columns (d), (e) and (f) represent residential customers placing installation orders or reporting trouble to the local exchange carrier during the current reporting period.

Column (d) - MSA - MSAs, or Metropolitan Statistical Areas, are designated by the Department of Commerce in a list following each decadal census. An MSA includes at least one city with a minimum population of 50,000 and its surrounding area, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See 45 Fed. Reg. 956 (1980). This amount represents all residential customers located within MSAs in the study area served by the reporting carrier.

Column (e) - Non-MSA - This amount represents all residential customers located outside of all MSAs in the study area served by the reporting carrier.

Column (f) - Total - This amount represents all residential customers in the study area served by the reporting carrier (the sum of columns (d) and (e)).

Business - Columns (g), (h) and (i) represent local service business customers placing installation orders or reporting trouble to the local exchange carrier during the current reporting period.

Column (g) - MSA - See column (c) for the definition of MSA. This amount represents all local service business customers located within MSAs in the study area served by the reporting carrier.

Column (h) - Non-MSA - This amount represents al local service business customers located outside of all MSAs in the study area served by the reporting carrier.

Column (i) - Total - This amount represents all business customers in the study area served by the reporting carrier.

Column (j) - Total - Enter the sum of columns (f) and (i) in this column.

Table III

Column (k) - Month 1 - The first month of the current reporting quarter.

Column (l) - Month 2 - The second month of the current reporting quarter.

Column (m) - Month 3 - The third months of the current reporting quarter.

Table IV

Column (n) - Total Number of Switches - Switching entities (switches) are assemblies of equipment designed to establish connections between lines and trunks. Switching entities include local, class 5 switching machines and any associated remotes; e.g., a host end office and its three associated remotes will be reported as four switching entities. Switching entities designed exclusively for access tandem, class 4, or operator services are not reported here. There may be more than one switching entity per central office or wire center. **Enter in whole numbers.**

Column (o) - Number of Switches Having Downtime - This column represents the number of switches that experienced downtime during the current reporting period. **Enter in whole numbers.**

Column (p) - Total Switch Downtime - Switch downtime occurs when call processing capability for an end office is lost. Report all downtime, in cumulative minutes to the nearest tenth, in this column.

Column (q) - Incidents Under Two Minutes - This amount represents the number of incidents of downtime under two minutes in duration. **Enter in whole numbers.**

Column (r) - Number Unscheduled - This amount represents the number of incidents of switch downtime under two minutes in duration that were not scheduled for routine maintenance or network upgrades. Scheduled downtime refers to those times when a switch is taken down at a predetermined time so that it may be upgraded. Such downtimes usually occur during non-busy hours. **Enter in whole numbers.**

Column (s) - Percent Unscheduled - This amount represents the percent of downtime that is not scheduled for routine maintenance or network upgrades. (The ratio of column (r) to column (q), in percent). **Enter in percent, rounded to 2 decimal places.**

Table IV.A

Column (t) - Cause - This column is five spaces wide (2 digits followed by three spaces) Each condition that causes downtime is entered here as one of the following two digit-codes:

01 - scheduled - includes outages, restarts, phases, etc. resulting from scheduled or planned manula initializations. This includes such activities as parameter loads, software/firmware changes, and other OA&M activities.

02 - procedural errors - telco - installation or maintenance related

03 - procedural errors - telco - non installation or maintenance related (deviation from established procedures, or human error within established procedures; includes failure to respond)

04 - procedural errors - system vendors - includes errors in documentation/instruction

05 - procedural errors - other vendors - e.g., contractor, independent installation vendor

06 - software design - faulty or ineffective design, including faulty patches or software overrides provided by vendor

07 - hardware design - design deficiency or error. Does not include Product Change Notice (PCN) inappropriately delayed by vendor (=procedural error vendor) or telco (=procedural error telco), or PCN waived by telco (=procedural error telco)

08 - hardware failure - random hardware failure not related to design but due to inherent unreliability of system components.

09 - acts of God - weather, natural disaster (including lightning, but not if lightning's effect due to bonding or grounding violations; then = procedural error vendor or telco)

10 - traffic overload - traffic load exceeds engineered capacity of system due to unforseen external condition; not if due to system trouble, inadequate engineering, inadequate network management, system design deficiency

11 - environmental - contamination, leaks, temperature, etc.

12 - external power failure - use of this classification is rare because of existencs of battery and other backup systems; does not include failures of converters, inverters internal to telco

13 - massive line outage - cable cut, other

14 - remote - loss of facilities between host and remote (if due to activities internal to host or remote; if external, assign other cause as appropriate--e.g., cable dig-up = procedural telco or procedural other vendor)

15 - other/unknown - must be footnoted; if unknown, so state

Thus a carrier noting an unscheduled outage due to an external power failure would report simply "12". Footnotes should be used to give further details when necessary.

Column (u) - Switch by CLLI - See description for column (k), Table IV. Enter the eight digit CLLI (Common Language Location Identifier) code which identifies the switch that experienced downtime of two minutes or more, to the nearest tenth, in duration. Enter data for only one outage incident on a row.

Column (v) - Access Lines - The number of working network access lines served by the switch. Enter in whole numbers.

Column (w) - MSA - See Table II, column (c) for the definition of MSA. Enter Y if the incident involved a downed switch that lies within an MSA in the study area served. Enter N if the incident involved a downed switch outside of all MSAs in the study area served.

Column (x) - Duration - Enter the duration of the outage in minutes, to the nearest tenth, in this column.

Column (xx) - Date - Enter the date of the outage in this column using the format mmddyy.

Column (yy) - Time - Enter the time of the outage in this column using format hhmm for a 24 hour clock (e.g., midnight = 2400; noontime = 1200; 6:30 p.m. = 1830, etc.)

Table V

Column (y) - Total - Enter the appropriate total study area amounts for rows 0320, 0321, 0322, 0330, 0331 and 0332 in this column. The amount in this column equals the sum of columns (z) and (aa).

Column (z) - MSA - See Table II, column (d) for the definition of MSA. Enter the appropriate MSA amounts for rows 0320, 0321, 0322, 0330, 0331 and 0332 in this column .

Column (aa) - Non-MSA - Enter the appropriate non-MSA amounts for rows 0320, 0321, 0322, 0330, 0331 and 0332 in this column.

CERTIFICATION

I certify that I am an officer of _____: that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

This document provides the instructions for FCC Report 43-06, the ARMIS Semi-Annual Service Quality Report, which was adopted in CC Docket No. 87-313. The instructions consist of the following sections, which are attached.

1. Reporting Procedures - details on the specific procedures to be followed when submitting this report to the Commission.

2. Report Definition - an illustration of the rows and columns to be reported and their definitions.

A. Introduction

This document contains details on the specific procedures to be followed when submitting FCC Report 43-06, the ARMIS Semi-Annual Service Quality Report, to the Commission.

B. General Information

1. FCC Report 43-06 was adopted by the Commission in the LEC Price Cap Order, Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-39 (1990). This report is prescribed for every local exchange carrier for whom price cap regulation is mandatory.

2. Affected carriers shall file by March 31 and September 30 of each year, the report for the previous calendar half.

3. The report shall be filed on a study area (Jurisdiction) basis.

4. Each report and diskette must be clearly labeled to include the report number, company, study area, period, COSA code, version and submission number. The report number is 43-06, which identified the filing as ARMIS Semi-Annual Service Quality Report. The period identifies the (CO - Company, SA =Study Area) for a list of companies and their respective COSAs. The version refers to whether the filing is confidential, public or unrestricted. The submission number is defined as follows: Submission 0 is for test data purposes only. Submission 1 is the first submission of a half's data. Higher numbers (2, 3, etc.) **must** be used **when filing** successive revisions to correct that half's submission. **All corrective submissions must be filed in both paper and diskette, with the Accounting and Audits Division, the Industry Analysis Division and Downtown Copy Center.**

5. All correspondence and pleadings shall identify the proceeding as CC Docket No. 87-313.

C. Where to File

1. Carriers submitting FCC Report 43-06 should consult the schedule below which details the number of copies required and the location to which those copies should be delivered.

2. Carriers are reminded that they must serve a copy of both the paper report and the automated report (diskette) on the FCC's contractor for public records duplication, Downtown Copy Center at 1114 21st Street, N.W., Washington, D.C. 20036 or Room 246 at FCC Headquarters, 1919 M St., N.W., Washington, D.C. 20036.

NUMBER OF COPIES

	Trans-mittal Letter	Paper Report	Automated Report (diskette)
FCC Secretary Room 222 1919 M Street, N.W. Washington D.C., 20554	1	-	-
FCC Common Carrier Bureau Accounting & Audits Division Room 812 2000 L Street, N.W. Washington, D.C. 20554	1	1	1
FCC Common Carrier Bureau Industry Analysis Division Room 538 1919 M Street, N.W. Washington, D.C. 20554	1	1	1
Downtown Copy Center Room 246 1919 M Street Washington, D.C. 20036	1	1	1

D. Footnotes

1. If any data for the current period differs materially from that for the previous period or the corresponding period of the preceding year and the difference is not self-explanatory but was caused by unusual circumstances, then include footnote text to explain the specific circumstances.

2. If the reporting carrier does not follow the procedures described in the row and column instructions of the attached Report Definition, it must explain any deviations from those procedures in an explanatory footnote. Such footnotes must provide detailed explanations of the procedures actually used by the carrier and its specific reasons for deviating from the procedures prescribed by the Commission's Rules. This provision should not be interpreted to mean that deviations from the prescribed rules will automatically be approved by the Commission.

3. Do not include explanatory footnotes in the transmittal letter. The footnote text must be included in the Footnote Text Records and the Footnote Table as specified in the Automated Report Specifications.

E. Errata

1. Carriers are under a legal obligation to correct any erroneous data discovered in FCC Report 43-06. Submissions containing corrected data must include references to indicate which data items were corrected since the previous submission.

2. Those reference must be included in the Erratum Records and the Erratum Table as specified in the Automated Report Specifications.

F. Certification

1. Carriers must certify the accuracy of the data submitted in FCC Report 43-06 by including a signed certification statement as the last page of the report.

2. The text of the certification statement is included on page 6 of 6 in the attached report definition.

G. Waivers

1. If a carrier determines that it will be unable to provide data required by FCC Report 43-06, it must file an application for waiver with the Commission following established Commission procedures. All such requests from a carrier should be included in a single application. The application must demonstrate good cause for reporting a different or lower level of detail and indicate how these deficiencies will be corrected.

2. Omission of individual data items or entries, without request for waiver, is unacceptable. One reason that compliance with the full requirements is so important is that omission of any single data entry by any carrier will jeopardize the accuracy of aggregate industry information.

H. Public Information

1. The paper reports filed as Report 43-06 may be examined by the public from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., Monday through Friday, in Room 812, 2000 L Street, N.W., Washington, D.C.

2. Copies of the paper or automated reports filed as Report 43-06 may be obtained from the FCC's contractor for Public records duplication, Downtown Copy Center at (202) 452-1422.

For further information regarding these procedures, contact:

Barabara Van Hagen
FCC Common Carrier Bureau
Accounting & Audits Division
(202) 634-1861

SUMMARY

This document provides the Report Definition for FCC Report 43-06, the ARMIS Semi-Annual Service Quality Report which must be provided semi-annually by study area. It contains the following:

	PAGE
Table II - Dial Tone Response and Transmission Quality	2
Table II - Row Instructions	3
Table II - Column Instructions	5
Certification	6

All percentage amounts must be entered in percent and rounded to 2 decimal places. **All monetary figures must be rounded to the nearest thousand dollars. All number of offices and objective delay (in seconds) must be entered in whole numbers.**

All fields must be populated. If there are no data applicable to a field, enter zero in that field. **See Data Entry Convention, No. 5, in the Automated Report Specifications.**

Do not include explanatory footnotes in the transmittal letter; such notes must be included in the Footnotes section of the filing.

NOTICE: The ARMIS Semi-Annual Service Quality Report collects data designed to capture trends in service quality under price cap regulation and improves and standardizes existing reporting requirements for this purpose. The ARMIS Semi-Annual Service Quality Report specifies information requirements in a consistent format and is essential to the FCC to monitor service quality under price cap regulation.

This report is prescribed for every mandatory price cap local exchange carrier and is not subject to the clearance procedures of 44 USC 3507 pursuant to the less than ten rule. Send comments regarding any aspect of this collection of information, including suggestions for reducing the burden to the Federal Communications Commission, Office of Managing Director, Washington, D.C. 30554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C., 20503.

FCC Report 43-06
ARMIS SEMIANNUAL SERVICE QUALITY REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE II
COSA: xxxx

TABLE II - DIAL TONE RESPONSE AND TRANSMISSION QUALITY

ROW		COLUMN
		TOTAL STUDY AREA
		(a)
	PERCENT OF OFFICES PERFORMING AT OR ABOVE DIAL TONE SPEED OBJECTIVE LEVEL:	
0200	Percent of Offices at or Above Objective	
0210	Number of Offices Measured	
0220	Objective Delay	
0230	Objective Percent of Calls for Each Office	
	PERCENT OF OFFICES MEETING ALL TRANSMISSION OBJECTIVES:	
0240	Percent of Offices Meeting Loss Objectives	
0241	Percent Offices Meeting C-Message Objectives	
0242	Percent of Offices Meeting Balance Objectives	
0243	Percent Offices Meeting Gain Slope Objectives	
0244	Percent of Offices Meeting C-Notch Objectives	
	PERCENT OF TRUNKS MEETING ALL TRANSMISSION OBJECTIVES:	
0250	Percent of Trunks Meeting Loss Objectives	
0251	Percent of Trunks Meeting Noise Objectives	
0252	Percent of Trunks Meeting Balance Objectives	
0253	Percent Trunks Meeting Gain Slope Objectives	
0254	Percent of Trunks Meeting C-Notch Objectives	

Semi-Annual Service Quality Report

General Instructions

Table I of this report is not standardized and is not, therefore, required to be filed in the ARMIS format. Table I will continue to be filed with the Industry Analysis Division using the same procedures that have been used in the past for filing the Semi-Annual Service Quality Report. Table II of this report is standardized and is required to be filed under ARMIS.

Row Instructions

Table II

Row 0200 through 0230 measure the ability of the switching equipment to provide dial tone for an originating call attempt within a specified period of time. The results of the test measurement are reflected in these rows as the percentage of dial tone offices which give dial tone within three seconds of lifting the telephone instrument. The measured performance is derived from call attempt samples taken during the central office busy hours. An office is considered to pass the performance test if a specified number of test calls receive dial tone within the three second criterion.

Row 0200 - Percent Sample at Objective Level - Enter the number of offices passing the measurement standard divided by the number of offices measured. **Enter in whole numbers.**

0210 - Number of Offices Measure - Enter the number of offices tested for dial tone speed. **Enter in whole numbers.**

Row 0220 - Objective Delay - Enter the maximum number of seconds for receiving dial tone (usually three seconds). **Enter in whole numbers.**

Row 0230 - Objective Percent of Calls for Each Office - Enter the percentage of call attempts sampled which must receive dial ton within the time specified (see row 0220) for an office to pass the measurement standard. **Enter in percent rounded to 2 decimal places.**

Row 0240 - Percent of Offices Meeting Loss Objectives - Enter the percentage of offices passing tests for signal attenuation or loss. **Enter in percent rounded to 2 decimal places.**

Row 0241 - Percent of Offices Meeting C-Message Objectives - Enter the percentage of offices passing tests for noise over the audible spectrum weighted in a manner consistent with human hearing. **Enter in percent rounded to 2 decimal places.**

Row 0242 - Percent of Offices Meeting Balance Objectives - Enter the percentage of offices passing tests for balance which determines the amount of echo heard by the subscriber. **Enter in percent rounded to 2 decimal places.**

Row 0243 - Percent of Offices Passing Gain Slope Objectives - Enter the percentage of offices passing tests for gain slope which is a measure of distortion. **Enter in percent rounded to 2 decimal places.**

Row 0244 - Percent of Offices Meeting C-Notch Objectives - Enter the percentage of offices passing tests for noise in specified portions of the signal bandwidth. **Enter in percent rounded to 2 decimal places.**

Row 0250 - Percent of Trunks Meeting Loss Objectives - Enter the percentage of trunks which must pass the loss test and the technical requirement for an office to pass (maintenance limit). **Enter in percent rounded to 2 decimal places.**

Row 0251 - Percent of Trunks Meeting Noise Objectives - Enter the percentage of trunks which must pass the noise test and the technical requirement for an office to pass (maintenance limit). **Enter in percent rounded to 2 decimal places.**

Row 0252 - Percent of Trunks Meeting Balance Objectives - Enter the percentage of trunks which must pass the balance test and the technical requirement for an office to pass (maintenance limit). **Enter in percent rounded to 2 decimal places.**

Row 0253 - Percent of Trunks Meeting Gain Slope Objective - Enter the percentage of trunks which must pass the gain slope test and the technical requirement for an office to pass (maintenance limit). **Enter in percent rounded to 2 decimal places.**

Row 0254 - Percent of Trunks Meeting C-Notch Objectives - Enter the percentage of trunks which must pass the C-notch test and the technical requirement for an office to pass (maintenance limit). **Enter in percent rounded to 2 decimal places.**

Semi-Annual Service Quality Report

Column Descriptions

Table II

Column (a) - Total Study Area - This column represents the total study area. A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state.

CERTIFICATION

I certify that I am an officer of _____: that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

This document provides the instructions for FCC Report 43-07, the ARMIS Infrastructure Report, which was adopted by the Commission in CC Docket No. 87-313. The instructions consist of the following sections, which are attached.

1. Reporting Procedures - details on the specific procedures to be followed when submitting this report to the Commission.

2. Report Definition - an illustration of the rows and columns to be reported and their definitions.

A. Introduction

This document contains details on the specific procedures to be followed when submitting FCC Report 43-07, the ARMIS Infrastructure Report, to the Commission.

B. General Information

1. FCC Report 43-07 was adopted by the Commission in the LEC Price Cap Order, Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990). This report is prescribed for every mandatory price cap local exchange carrier. This report is not subject to the clearance procedures of 44 USC 3507 because there are less than ten respondents.

2. Affected carriers shall file by June 30 of each year for the previous calendar year.

3. The report shall be filed on a study area (Jurisdiction) basis.

4. Each report and diskette must be clearly labeled to include the report number, company, study area, period, COSA code, version and submission number. The report number is 43-07, which identifies the filing as the ARMIS Infrastructure Report. The period identifies the year covered by the data. See the attached COSA Code Table (CO = Company, SA = Study Area) for a list of companies and their respective COSAs. The version refers to whether the filing is confidential, public or unrestricted. The submission number is defined as follows: Submission 0 is for test data purposes only. Submission 1 is the first submission of a quarter's data. Higher numbers (2, 3, etc.) **must** be used **when** filing successive revision to correct that quarter's submission. **All corrective submissions must be filed, in both paper and diskette, with the Accounting and Audits Division, the Industry Analysis Division, and Downtown Copy Center.**

5. All correspondence and pleadings shall identify the proceeding as CC Docket No. 87-313.

Where to file

1. Carriers submitting FCC Report 43-07 should consult the schedule below which details the number of copies required and the location to which those copies should be delivered.

2. Carriers are reminded that they must serve a copy of both the paper report and the automated report (diskette) on the FCC's contractor for public records duplication, Downtown Copy Center at 1114 21st Street, N.W., Washington, D.C. 20036 or delivered to Downtown Copy Center in Room 246 at FCC Headquarters, 1919 M Street, N.W., Washington, D.C. 20036.

NUMBER OF COPIES

	Trans-mittal Letter	Paper Report	Automated Report (diskette)
FCC Secretary Room 222 1919 M Street, N.W. Washington, D.C. 20554	1	-	-
FCC Common Carrier Bureau Accounting & Audits Division Room 812 2000 L Street, N.W. Washington D.C., 20554	1	1	1
FCC Common Carrier Bureau Industry Analysis Division Room 538 1919 M Street, N.W. Washington, D.C. 20554	1	1	1
Downtown Copy Center Room 246 1919 M Street, N.W. Washington, D.C. 20036	1	1	1

D. Footnotes

1. If any data for the current period differs materially from that for the previous period or the corresponding period of the preceding year and the difference is not self-explanatory but was caused by unusual circumstances, then include footnote text to explain the specific circumstances.

2. If the reporting carrier does not follow the procedures described in the row and column instructions of the attached Report Definition, it must explain any deviations from those procedures

3. Do not include explanatory footnotes in the transmittal letter. The footnote text must be included in the Footnote Text Records and the Footnote Table as specified in the Automated Report Specifications.

E. Errata

1. Carriers are under a legal obligation to correct any erroneous data discovered in FCC Report 43-07. Submission containing corrected data must include references to indicate which data items were corrected since the previous submission.

2. Those reference must be included in the Erratum Records and the Erratum Table as specified in the Automated Report Specifications.

F. Certification

1. Carriers must certify the accuracy of the data submitted in FCC Report 43-07 by including a signed certification statement as the last page of the paper report.

2. The text of the certification statement is included on page 21 of 21 in the attached report definition.

G. Waivers

1. If a carrier determines that it will be unable to provide data required by FCC Report 43-07, it must file an application for waiver with the Commission following established Commission procedures. All such requests from a carrier should be included in a single application. The application must demonstrate good cause for reporting a different or lower level or detail and indicate how these deficiencies will be corrected.

H. Public Information

1. The paper reports filed as Report 43-07 may be examined by the public from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., Monday through Friday, in Room 812, 2000 L Street, N.W., Washington, D.C.

2. Copies of the paper or automated reports filed as Report 43-07 may be obtained from the FCC's contractor for public records duplication, Downtown Copy Center at (202) 452-1422.

For further information regarding these procedures, contact:

Barbara Van Hagen
FCC Common Carrier Bureau
Accounting & Audits Division
(202) 634-1861

SUMMARY

This document provides the Report Definition for FCC Report 43-07, the ARMIS Infrastructure Report which must be provided annually by study area. It contains the following:

	PAGE
Table I - Switching Equipment Table	2
Table II - Transmission Facilities Table	4
Table III - LEC Call Set-Up Time Table	6
Table IV - Additions and Book Costs Table	7
Table I - Row Instructions	8
Table II - Row Instructions	14
Table III - Row Instructions	17
Table IV - Row Instructions	18
Table I - Column Descriptions	19
Table II - Column Descriptions	19
Table III - Column Descriptions	19
Table IV - Column Descriptions	20
Certification	21

All percentage amounts must be entered in percent and rounded to 2 decimal places. All kilometers must be rounded to 1 decimal place. All monetary figures must be rounded to the nearest thousand dollars. All access lines must be rounded to the nearest thousand **with the exception of access line gain which must be entered in whole numbers. All switches, tandems, host remotes, interfaces, circuit lines, carrier links, terminations, channels, copper pairs, and fiber strands must be entered in whole numbers.**

All fields must be populated. If there are no data applicable to a field, enter zero in that field. **See Data Entry Convention, No. 5, in the Automated Report Specifications.**

Do not include explanatory footnotes in the transmittal letter; such notes must be included in the Footnotes section of the filing.

NOTICE: The ARMIS Infrastructure Report collects data designed to capture trends in telephone industry infrastructure development under price cap regulation and improves and standardizes existing reporting requirements for this purpose. The ARMIS Infrastructure Report specifies information requirements in a consistent format and is essential to the FCC to monitor service quality under price cap regulation. Your response is mandatory.

This report is prescribed for every mandatory price cap local exchange carrier and is not subject to the clearance procedures of 44 USC 3507 pursuant to the less than ten rule. Send comments regarding any aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, D.C., 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington D.C., 20503.

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE I
COSA: xxxx

TABLE I - SWITCHING EQUIPMENT

ROW		COLUMN		
		TOTAL STUDY AREA	WITHIN MSA	NON-MSA
		(a)	(b)	(c)
	SWITCHING ENTITIES/LINES IN SERVICE:			
0110	Total Switching Entities		N/A	N/A
0111	Local Switches			
0112	Tandems		N/A	N/A
0113	Hosts			
0114	Remotes (Stand Alone Only)			
0120	Total Number Access Lines in Service			
	TYPE OF SWITCH:			
0130	Total E/M Switches		N/A	N/A
0131	Percent Total Switches		N/A	N/A
0132	E/M Local Switches			
0133	Percent Local Switches			
0134	E/M Tandems		N/A	N/A
0135	Percent Total Tandems		N/A	N/A
0140	E/M Lines Served			
0141	Percent Total Lines			
0150	Total ASPC Switches		N/A	N/A
0151	Percent Total Switches		N/A	N/A
0152	ASPC Local Switches			
0153	Percent Local Switches			
0154	ASPC Tandems		N/A	N/A
0155	Percent Total Tandems		N/A	N/A
0160	ASPC Lines Served			
0161	Percent Total Lines			
0170	Total DSPC Switches		N/A	N/A
0171	Percent Total Switches		N/A	N/A
0172	DSPC Local Switches			
0173	Percent Local Switches			
0174	DSPC Tandems		N/A	N/A
0175	Percent Total Tandems		N/A	N/A
0180	DSPC Lines Served			
0181	Percent Total Lines			
	SWITCHING CAPABILITY:			
0190	Switches Equipped for Equal Access		N/A	N/A
0191	Percent Total Switches		N/A	N/A

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE I
COSA: xxxx

TABLE I - SWITCHING EQUIPMENT

ROW		COLUMN		
		TOTAL STUDY AREA (a)	WITHIN MSA (b)	NON-MSA (c)
0200	Access Lines with Equal Access			
0201	Percent Total Lines			
0210	Touch-Tone Capable Switches			
0211	Percent Total Switches			
0220	Access Lines with Touch-Tone Capability			
0221	Percent Total Lines			
0230	Total Switches Equipped with SS7-394		N/A	N/A
0231	Percent Total Switches		N/A	N/A
0232	Lines with Access to SS7-394			
0233	Percent Total Access Lines			
0234	Total Switches Equipped with SS7-317		N/A	N/A
0235	Percent Total Switches		N/A	N/A
0236	Lines with Access to SS7-317			
0237	Percent Total Access Lines			
0240	Local Switches Equipped with SS7-394			
0241	Percent Total Local Switches			
0246	Local Switches Equipped with SS7-317			
0247	Percent Total Local Switches			
0250	Tandems Equipped with SS7-394		N/A	N/A
0251	Percent Total Tandems		N/A	N/A
0256	Tandems Equipped with SS7-317		N/A	N/A
0257	Percent Total Tandems		N/A	N/A
0270	Total Switches Equipped with ISDN		N/A	N/A
0271	Percent Total Switches		N/A	N/A
0280	Local Switches Equipped with ISDN			
0281	Percent Total Local Switches			
0290	Tandems Equipped with ISDN		N/A	N/A
0291	Percent Total Tandems		N/A	N/A
0300	Lines with Potential Access to ISDN			
0301	Percent Total Lines			
0311	Basic Rate ISDN (BRI) Interfaces Equipped			
0312	Primary Rate ISDN (PRI) Interfaces Equipped			

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE II
COSA: xxxx

TABLE II - TRANSMISSION FACILITIES

ROW		COLUMN
		TOTAL STUDY AREA
		(d)
SHEATH KILOMETERS:		
0320	Total Sheath Kilometers	
0321	Copper	
0322	Fiber	
0323	Other	
INTEROFFICE WORKING FACILITIES:		
0330	Total Circuit Links	
0331	Baseband	
0332	Analog CXR	
0333	Digital CXR	
0350	Analog Carrier Links	
0351	Copper	
0352	Radio	
0360	Digital Carrier Links	
0361	Copper	
0362	Radio	
0363	Fiber	
LOOP PLANT - CENTRAL OFFICE TERMINATIONS:		
0370	Total Working Channels	
0380	Copper	
0381	Baseband	
0382	Analog CXR	
0383	Digital CXR	
0390	Fiber Digital CXR	
0410	Other	

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE II
COSA: xxxx

TABLE II - TRANSMISSION FACILITIES

ROW		COLUMN
		TOTAL STUDY AREA
		(d)
0420	Total Equipped Channels	
0430	Copper	
0431	Baseband	
0432	Analog CXR	
0433	Digital CXR	
0440	Fiber Digital CXR	
0460	Other	

OTHER TRANSMISSION FACILITY DATA:

0470	Copper Prs Term Main Frame (Loop Plant Only)	
0480	Fiber Strands Term in the CO (Loop Plnt Only)	
0481	Fiber Term at Customer Premises DS0 Rate	
0482	Fiber Term at Customer Premises DS1 Rate	
0483	Fiber Term at Customer Premises DS2 Rate	
0484	Fiber Term at Cust Prem DS3 Rate and higher	

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE III
COSA: xxxx

TABLE III - LEC CALL SET-UP TIME

Row	Classification	Column					
		Average Call Set-Up Time					
			Direct		Via Access Tandem		
		End Offices	SS7-394	MF	SS7-394	MF	Mixed
		(e)	(f)	(g)	(h)	(i)	(j)
	TIME:						
0510	Total						
0511	End Offices/EMs						
0512	End Offices/SPC Analogs						
0513	End Offices/Digitals						
	PERCENT:						
0520	Total Access Lines						
0521	Access Lines/EMs						
0522	Access Lines SPC/Analog						
0523	Access Lines/Digitals						

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE IV
COSA: xxxx

TABLE IV - ADDITIONS AND BOOK COSTS

ROW		COLUMN
		TOTAL STUDY AREA
		(k)
0530	Total Access Lines in Service	
0531	Access Line Gain	
0540	Total Gross Capital Expenditures	

Infrastructure Report

General Instructions

For the purposes of this report, the terms switch, switching entity and entity are used interchangeably. The terms access lines, lines and lines in service are also used interchangeably.

Row Instructions

Table I

Switching Entities - Switching entities are assemblies of equipment designed to establish connections between lines and trunks. Switching entities include access tandems, local, class 5 switching machines and any associated remotes; e.g., a host end office and its three associated remotes will be reported as four switching entities. There may be more than one switching entity per central office or wire center. Switching entities designed exclusively for operator services are not reported here. **Enter in whole numbers.**

Lines in Service - Access lines include all classifications of local exchange telephone service including, but not limited to, individual lines, party line access, PBX access, Centrex access, Coin access, Foreign Exchange access and WATS access. Access lines, as defined herein, is a more inclusive term than billable access lines, as defined in the ARMIS 43-01 and 43-04 reports. See row instructions for rows 2090 through 2140 of the ARMIS 43-01 report and for 9010 of the ARMIS 43-04 report for the definition of billable access lines. **Round to the nearest thousand.**

Row 0110 - Total Switching Entities - Enter the total number of local and access tandem switching entities on this row. **Remotes to be included in the total switching entities count are those described in the general definition of remote.[1] A remote switching entity can generally be described as a switching entity that has no connection to the facilities network except through one other (host) switching entity that shares the processing capabilities of another switching system for certain control functions under the direction of the host central processor, and that can be controlled remotely by the host over a pair of dedicated data links.** This amount is equal to the sum of rows 0130, 0150 and 0170. Tandem switching entities are used to connect local switching entities with local switching entities in other central offices. This report includes those tandems that are designed exclusively to establish connections between trunks. Since some switches are used for both local and access tandem switching, the sum of rows 0110 and 0112 may be greater than the amounts entered on this row. For example, if there are 6 local switches, 4 tandem switches and 5 switches that are used for both local and tandem switching, row 0111 would equal 11 local switches, row 0112 would equal 9 switches, and row 0110 would equal 14 switches. In this case, the sum of rows

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[1] See, 7 FCC Rcd 3590 (Com. Car. Bur. 1992).

0111 and 0112 (20) would be greater than the amount of total switching entities (15). Since we are asking only for the number of remotes with stand alone capability, the total of rows 0113 and 0114 will be less than the amounts entered on this row. For example, if there are 16 total switching entities, and there are 3 hosts and 7 remotes that have stand alone capability, the sum of rows 0113 and 0114 (10) would be less than the amount of total switching entities (16). **Enter in whole numbers.**

Row 0111 - Local Switches - Enter the total number of switches used as local switches on this row. This amount is equal to the sum of rows 132, 152 and 172. **Enter in whole numbers.**

Row 0112 - Access Tandems - Enter the total number of switches with access tandem capability on this row. This amount is equal to the sum of rows 134, 154 and 174. **Enter in whole numbers.**

Row 0113 - Hosts - A host is a switch serving one or more remotes. **Enter in whole numbers.**

Row 0114 - Remotes (Stand Alone Only) - A remote switching entity can generally be described as a switching entity that has no connection to the facilities network except through one other (host) switching entity, that shares the processing capabilities of another switching system for certain control functions under the direction of the host central processor, and that can be controlled remotely by the host over a pair of dedicated data links. All types of remote switches are included with the switching entity counts. However, row 0114 excludes separate reporting of remotes that are incapable of providing stand alone operation when the host switch fails. Only those remote switching entities that are equipped to operate in a stand alone fashion (i.e., able to operate when the host fails, or the data links to the host fail) to be able to provide more limited service, are to be reported on row 0114. Remote entities that are not within this description should not be included on this row. **Enter in whole numbers.**

Row 0120 - Total Number Access Lines In Service - Enter the total number of access lines in service on this row. This amount is equal to the sum of rows 0140, 0160 and 0180. **Round to the nearest thousand.**

Type of Switch - Types of switches include Electro-Mechanical (E/M), e.g., Step-by-Step and Crossbar; Analog Stored Program Controlled (ASPC); and Digital Stored Program Controlled (DSPC).

Row 0130 - Total E/M Switches - Enter the total number of local and tandem Electro-Mechanical switches on this row. Since some switches are used for both local and tandem switching, the sum of rows 132 and 134 may be greater than the amounts entered on this row (see example, row 0110). **Enter in whole numbers.**

Row 0131 - Percent Total Switches - Enter the ratio of Electro-Mechanical switches to total switches, in percent (row 130 divided by row 110). **Round to 2 decimal places.**

Row 0132 - E/M Local Switches - Enter the total number of Electro-Mechanical switches used as local switches on this row. **Enter in whole numbers.**

Row 0133 - Percent Local Switches - Enter the ratio of Electro-Mechanical local switches to total local switches, in percent (row 0132 divided by row 0111). **Round to 2 decimal places.**

Row 0134 - E/M Tandems - Enter the total number of Electro-Mechanical switches with tandem capability on this row. **Enter in whole numbers.**

Row 0135 - Percent Total Tandems - Enter the ratio of Electro-Mechanical tandems to total tandems, in percent (row 0134 divided by 0112). **Round to 2 decimal places.**

Row 140 - E/M Lines Served - Enter the number of lines served by Electro-Mechanical switches. **Round to the nearest thousand.**

Row 0141 - Percent Total Lines - Enter the ratio of lines served by Electro-Mechanical switches to total lines in service, in percent (row 0140 divided by row 0120). **Round to 2 decimal places.**

Row 0150 - Total ASPC Switches - Enter the total number of local and tandem Analog Stored Program Controlled switches. Since some switches are used for both local and tandem switching, the sum of rows 152 and 154 may be greater than the amounts entered on this row (see example, row 0110). **Enter in whole numbers.**

Row 0151 - Percent Total Switches - Enter the ratio of Analog Stored Program Controlled switches to total switches, in percent (row 0150 divided by row 0110). **Round to 2 decimal places.**

Row 0152 - ASPC Local Switches - Enter the total number of Analog Stored Program Controlled switches used as local switches on this row. **Enter in whole numbers.**

Row 0153 - Percent Local Switches - Enter the ratio of Analog Stored Program Controlled switches to total local switches, in percent (row 0152 divided by row 0111). **Round to 2 decimal places.**

Row 0154 - ASPC Tandems - Enter the total number of Analog Stored Program Controlled switches with tandem capability on this row. **Enter in whole numbers.**

Row 0155 - Percent Total Tandems - Enter the ratio of Analog Stored Program Controlled tandems to total tandems, in percent (row 0154 divided by row 0112). **Round to 2 decimal places.**

Row 0160 - ASPC Lines Served - Enter the number of lines served by Analog Stored Program Controlled switches. **Round to the nearest thousand.**

Row 0161 - Percent Total Lines - Enter the ratio of lines served by Analog Stored Program Controlled switches to total lines in service, in percent (row 160 divided by row 0120). **Round to 2 decimal places.**

Row 0170 - Total DSPC Switches - Enter the total number of local and tandem Digital Stored Program Controlled switches. Since some switches are used for both local and tandem switching, the sum of rows 172 and 174 may be greater than the amounts entered on this row (see example, row 0110). **Enter in whole numbers.**

Row 0171 - Percent Total Switches - Enter the ratio of Digital Stored Program Controlled switches to total switches, in percent (row 0170 divided by row 0110). **Round to 2 decimal places.**

Row 0172 - DSPC Local Switches - Enter the total number of Digital Stored Program Controlled switches used as local switches on this row. **Enter in whole numbers.**

Row 0173 - Percent Local Switches - Enter the ratio of Digital Stored Program Controlled local switches to total local switches, in percent (row 0172 divided by row 0111). **Round to 2 decimal places.**

Row 0174 - DSPC Tandems - Enter the total number of Digital Stored Program Controlled switches with tandem capability on this row. **Enter in whole numbers.**

Row 175 - Percent Total Tandems - Enter the ratio of Digital Stored Program Controlled tandems total tandems, in percent (row 0174 divided by row 0112). **Round to 2 decimal places.**

Row 0180 - DSPC Lines Served - Enter the number of lines served by Digital Stored Program Controlled switches. **Round to the nearest thousand.**

Row 0181 - Percent Total Lines - Enter the ratio of lines served by Digital Stored Program Controlled switches to total lines in service, in percent (row 0180 divided by row 0120). **Round to 2 decimal places.**

Row 0190 - Switches Equipped for Equal Access - Enter the number of switching entities equipped for equal access, Feature Group D service. **Enter in whole numbers.**

Row 0191 - Percent Total Switches - Enter the ratio of switches equipped for equal access to total switches, in percent (row 0190 divided by row 0110). **Round to 2 decimal places.**

Row 0200 - Access Lines with Equal Access - Enter the number of access lines served by switches equipped for equal access. **Round to the nearest thousand.**

Row 0201 - Percent Total Lines - Enter the ratio of lines served by switches equipped for equal access to total lines in service, in percent (row 0200 divided by row 0120). **Round to 2 decimal places.**

Row 0210 - Touch-Tone Capable Switches - Enter the number of switching entities equipped for Touch-Tone. **Enter in whole numbers.**

Row 0211 - Percent Total Switches - Enter the ratio of switches equipped for Touch-Tone to total switches, in percent (row 0210 divided by row 0111). **Round to 2 decimal places.**

Row 0220 - Access Lines with Touch-Tone Capability - Enter the number of access lines served by switches equipped for Touch-Tone. **Round to the nearest thousand.**

Row 0221 - Percent Total Lines - Enter the ratio of access lines served by switches equipped for Touch-Tone to total access lines, in percent (row 0220 divided by row 0120). **Round to 2 decimal places.**

Row 0230 - Total Switches Equipped with SS7-394 - Enter the total number of local and tandem switches equipped with SS7-394. **Enter in whole numbers.**

Row 0231 - Percent Total Switches - Enter the ratio of switches equipped with SS7-394 to total switches, in percent (row 0230 divided by row 0110). **Round to 2 decimal places.**

Row 0232 - Lines with Access to SS7-304 - Enter the number of lines in service that are served by switches equipped with SS7-394. **Round to the nearest thousand.**

Row 0233 - Percent Total Access Lines - Enter the ratio of lines with access to SS7-394 to total access lines, in percent (row 0232 divided by row 0120). **Round to 2 decimal places.**

Row 0234 - Total Switches Equipped with SS7-317 - Enter the total number of switches equipped with SS7-317 on this row. **Enter in whole numbers.**

Row 0235 - Percent Total Switches - Enter the ratio of switches equipped with SS7-317 to total switches, in percent (row 0234 divided by row 0110). **Round to 2 decimal places.**

Row 0236 - Lines with Access to SS7-317 - Enter the number of lines in service with access to SS7-317. **Round to the nearest thousand.**

Row 0237 - Percent Total Access Lines - Enter the ratio of access lines with SS7-317 to total access lines, in percent (row 0236 divided by row 0120). **Round to 2 decimal places.**

Row 0240 - Local Switches Equipped with SS7-394 - Enter the number of switches used as local switches that are equipped with SS7-394. **Enter in whole numbers.**

Row 0241 - Percent Total Local Switches - Enter the ratio of local switches equipped with SS7-394 to total local switches, in percent (row 0240 divided by row 0111). **Round to 2 decimal places.**

Row 0246 - Local Switches with SS7-317 - Enter the total number of local switches equipped with SS7-317. **Enter in whole numbers.**

Row 0247 - Percent Total Local Switches - Enter the ratio of local switches equipped with SS7-317 to total local switches, in percent (row 0246 divided by row 0111). **Round to 2 decimal places.**

Row 0250 - Tandems Equipped with SS7-394 - Enter the total number of switches with tandem capability that are equipped with SS7-394. **Enter in whole numbers.**

Row 0251 - Percent Total Tandems - Enter the ratio of tandem switches equipped with SS7-394 to total tandems, in percent (row 0250 divided by row 0112). **Round to 2 decimal places.**

Row 0256 - Tandems Equipped with SS7-317 - Enter the total number of switches with tandem capability that are equipped with SS7-317. **Enter in whole numbers.**

Row 0257 - Percent Total Tandems - Enter the ratio of tandem switches equipped with SS7-317 to total tandems, in percent (row 0256 divided by row 0112). **Round to 2 decimal places.**

Row 0270 - Total Switches Equipped with ISDN - Enter the total number of local and tandem switches that are equipped with ISDN. Since some switches are used for both local and tandem switching, the sum of rows 0280 and 0290 may be greater than the amounts entered on this row (see example, row 0110). **Enter in whole numbers.**

Row 0271 - Percent Total Switches - Enter the ratio of switches equipped with ISDN to total switches, in percent (row 0270 divided by row 0110). **Round to 2 decimal places.**

Row 0280 - Local Switches Equipped with ISDN - Enter the number of switches used as local switches that are equipped with ISDN. **Enter in whole numbers.**

Row 0281 - Percent Total Local Switches - Enter the ratio of local switches equipped with ISDN to total local switches, in percent (row 0280 divided by row 0111). **Round to 2 decimal places.**

Row 0290 - Tandems Equipped with ISDN - Enter the number of switches with tandem capability on this row. **Enter in whole numbers.**

Row 0291 - Percent Total Tandems - Enter the ratio of tandems equipped with ISDN to total tandems, in percent (row 0290 divided by row 0112). **Round to 2 decimal places.**

Row 0300 - Lines with Potential Access to ISDN - Enter the number of lines served by switches equipped with ISDN. **Round to the nearest thousand.**

Row 0301 - Percent Total Lines - Enter the ratio of lines in service with access to ISDN to total lines in service, in percent (row 0300 divided by row 0120). **Round to 2 decimal places.**

Row 0311 - Basic Rate ISDN (BRI) Interfaces Equipped - Basic rate ISDN consists of two Bearer Channels at 64 Kilobits/second and one Delta Channel at 16 kilobits/second. Quantities reflected are the number of (2B+D) BRI interfaces equipped. This amount represents actual interfaces equipped with ISDN. **Enter in whole numbers.**

Row 0312 - Primary Rate ISDN (PRI) Interfaces Equipped - Equivalent primary rate ISDN interfaces are generally configured as 23 Bearer Channels and one Delta Channel all at 64 kilobits/second. Quantities reflected are the number of equivalent PRI (23B+D) ISDN interfaces equipped, excluding interoffice PRI ISDN interfaces. This amount represents actual interfaces equipped with ISDN. **Enter in whole numbers.**

Table II

Row 0320 - Total Sheath Kilometers - Sheath kilometers include loop, interoffice and toll sheath kilometers. **Round to 1 decimal place.**

Row 0321 - Copper - Enter the number of sheath kilometers of twisted pair copper cable on this row. **Round to 1 decimal place.**

Row 0322 - Fiber - Enter the number of sheath kilometers of fiber on this row. **Round to 1 decimal place.**

Row 0323 - Other - Enter the number of sheath kilometers of aluminum, coaxial, and all other sheath kilometers not included in rows 0321 or 0322, on this row. **Round to 1 decimal place.**

Row 0330 - Total Circuit Links - A circuit link is that link that exists between points A and B where voice frequency/DSO cross-connects and/or analog/digital conversion (collectively referenced here as conversion) occurs. Circuit links are counted as follows: If there is a circuit between A and B with no intermediate conversions, count one circuit link for each voice frequency equivalent channel. If there is a circuit between A and B with one intermediate conversion, count two circuit links for each voice frequency equivalent channel. Similarly, two intermediate conversions between A and B would result in three circuit links per voice equivalent channel. **Enter in whole numbers.**

Row 0331 - Baseband - Enter the number of baseband circuit links on this row. **Enter in whole numbers.**

Row 0332 - Analog CXR - Enter the number of analog CXR circuit links, converted to voice frequency equivalents, on this row. **Enter in whole numbers.**

Row 0333 - Digital CXR - Enter the number of digital CXR circuit links, converted to voice grade equivalents, on this row. **Enter in whole numbers.**

Carrier Links - A Carrier Technology Segment (carrier link) is defined as a segment of the interoffice network disaggregated by technology (i.e., **analog, digital); and by medium (i.e., copper, fiber, or radio).** Each segment between central offices or other interoffice network nodes is defined as a unique carrier technology segment. For these purposes, a central office is an interoffice network node. Other interoffice network nodes are defined as any points in the interoffice network where a cross-connect occurs, or where a change in technology or medium occurs. Counts are on an analog group or DS1 equivalent basis.

Row 0350 - Analog Carrier Links - Enter the number of analog carrier links on this row. **Enter in whole numbers.**

Row 0351 - Copper - Enter the number of copper analog carrier links on this row. **Enter in whole numbers.**

Row 0352 - Radio - Enter the number of radio analog carrier links on this row. **Enter in whole numbers.**

Row 0360 - Digital Carrier Links - Enter the number of digital carrier links on this row. **Enter in whole numbers.**

Row 0361 - Copper - Enter the number of copper digital carrier links on this row. **Enter in whole numbers.**

Row 0362 - Radio - Enter the number of radio digital carrier links on this row. **Enter in whole numbers.**

Row 0363 - Fiber - Enter the number of fiber digital carrier links on this row. **Enter in whole numbers.**

LOOP PLANT - CENTRAL OFFICE TERMINATIONS - These facilities are from the central office to the end users. Local loop includes analog type services only. It excludes ISDN.

Row 0370 - Total Working Channels - Working Channels are on a 4 kHz bandwidth (single voice channel) basis. Working channels originating from a remote switch are treated the same as if the channels originated in the host central office. All reports of working channels are counted on this 4 kHz basis for purposes of this report. This amount equals the sum of rows 0380, 0390 and 0410. **Enter in whole numbers.**

Row 0380 - Total Copper - Enter the number of copper working channels on this row. This amount equals the sum of rows 0381, 0382 and 0383. **Enter in whole numbers.**

Row 0381 - Baseband - Enter the number of analog copper working channels, converted to voice frequency equivalents, on this row. **Enter in whole numbers.**

Row 0382 - Analog - Enter the number of analog copper working channels, converted to voice frequency equivalents, on this row. **Enter in whole numbers.**

Row 0383 - Digital - Enter the number of digital copper working channels, converted to voice frequency equivalents, on this row. **Enter in whole numbers.**

Row 390 - Fiber Digital CXR - Enter the number of fiber digital CXR working channels, converted to voice frequency equivalents, on this row. **Enter in whole numbers.**

Row 0410 - Other - Enter the number of other working channels on this row. Explain the data entered here in a footnote. **Enter in whole numbers.**

Row 0420 - Total Equipped Channels - Equipped channels are on a 4 kHz bandwidth (single voice channel) basis. Equipped channels originating from a remote switch are treated the same as if the channels originated in the host central office. This amount equals the sum of rows 0430, 0440 and 0460. **Enter in whole numbers.**

Row 0430 - Copper - Enter the number of copper equipped channels on this row. This amount equals the sum of rows 0431, 0432 and 0433. **Enter in whole numbers.**

Row 0431 - Baseband - Enter the number of baseband copper equipped channels **in whole numbers** on this row.

Row 0432 - Analog CXR - Enter the number of analog CXR copper equipped channels **in whole numbers** on this row.

Row 0433 - Digital CXR - Enter the number of digital CXR copper equipped channels **in whole numbers** on this row.

Row 0440 - Fiber Digital CXR - Enter the number of fiber digital CXR equipped channels **in whole numbers** on this row.

Row 0460 - Other - Enter the number of other equipped channels **in whole numbers** on this row. Explain the data entered here in a footnote.

Row 0470 - Copper Pairs Terminated at the Main Frame (Loop Plant Only) - Enter the number of copper pairs terminated at the main frame **in whole numbers.**

Row 0480 - Fiber Strands Terminated in the Central Office (Loop Plant Only)- Enter the number of individual fiber strands terminated in central offices **in whole numbers** on this row.

Row 0481 - Fiber Terminated at Customer's Premises at the DS0 Rate - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS0 rate on this row. **Enter in whole numbers.**

Row 0482 - Fiber Terminated at Customer's Premises at the DS1 Rate - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS1 rate on this row. **Enter in whole numbers.**

Row 0483 - Fiber Terminated at Customer's Premises at the DS2 Rate - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS2 rate on this row. **Enter in whole numbers.**

Row 0484 - Fiber Terminated at the Customer's Premises at the DS3 Rate or Higher -Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS3 rate or higher on this row. Footnote the number of individual services provided over fiber strands terminated at the customer's premises at a higher than DS3 rate, if any. **Enter in whole numbers.**

Table III

Row 0510 - Total - Enter the data **in whole numbers** for the total number of end offices in the appropriate columns on this row.

Row 0511 - End Offices Electro-Mechanical Switches - Enter the data for the total number of end offices equipped with electro-mechanical switches in the appropriate columns on this row. **Enter in whole numbers.**

Row 0512 - End Office SPC Analog Switches - Enter the data for the total number of end offices equipped with SPC analog switches in the appropriate columns in this row. **Enter in whole numbers.**

Row 0513 - End Office Digital Switches - Enter the data for the total number of end offices equipped with Digital Switches in the appropriate columns on this row. **Enter in whole numbers.**

Row 0520 - Total Access Lines - Enter the percent of the network represented by the total number of access lines in the appropriate columns in this row. **Round to 2 decimal places.**

Row 0521 - Access Lines Electro-Mechanical Switches - Enter the percent of the network represented by the total number of access lines equipped with electro-mechanical switches in the appropriate columns on this row. **Round to 2 decimal places.**

Row 0522 - Access Lines SPC Analog Switches - Enter the percent of the network represented by the total number of access lines equipped with SPC analog switches in the appropriate columns on this row. **Round to 2 decimal places.**

Row 0523 - Access Lines Digital Switches - Enter the percent of the network represented by the total number of access lines equipped with Digital Switches in the appropriate columns on this row. **Round to 2 decimal places.**

Table IV

Row 0530 - Total Access Lines in Service - Enter the number of all access lines in service on this row. **Round to the nearest thousand.**

Row 0531 - Access Line Gain - This amount is calculated by subtracting outward movement from inward movement. **Enter in whole numbers.**

Row 0540 - Total Gross Capital Expenditures - Enter the dollar amount of gross additions to accounts 2110, 2210, 2220, 2230, 2310, 2410, 2680 and 2690 during the current reporting period. See also ARMIS Report 43-02, row 260, column (ac). Gross capital expenditures are consistent with Form M and ARMIS. **Round to the nearest thousand.**

Infrastructure Report

Column Descriptions

Table I

Column (a) - Total Study Area - This column represents the total study area. A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state. Enter the facilities in the total study area in this column. This amount should equal column (b) plus column (c).

Column (b) - within MSA - This column represents all MSAs served within the study area. MSAs, or Metropolitan Statistical Areas, are designated by the Department of Commerce in a list following each decadal census. An MSA includes at least one city with a minimum population of 50,000 and its surrounding area, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See, 45 Fed. Reg. 956 (1980). This definition and the current list remain in effect until the new list of metropolitan statistical areas and changes in definition, if any, are issued in June 1992. Enter the facilities within any MSA in the Study Area in this column.

Column (c) - non-MSA - This column represents all areas which lie outside of any MSA. Enter the facilities in the Study Area which are located outside of any MSA.

Table II

Column (d) - Total Study Area - See description for Table I, column (a).

Table III

Call Set-Up Time - For the purposes of infrastructure reporting, call set-up time is defined as **"the time between dialing the last digit and the response or acknowledgement 'winkback', or the acknowledgement of signal receipt from the interexchange carrier."**

Column (e) - End Offices - Enter the total number of end offices appropriate for each row, in this column. The access line counts in this column should be consistent with the access line data provided in Table I of the Infrastructure Report. Footnote the number of end offices used in the Bellcore studies that developed the underlying data.

Average Call Set-Up Time - Average call set-up time is the average amount of call set-up time for all end office types.

Direct - Direct access from the end office to the interexchange carrier POP.

Column (f) - SS7-394 - Enter the average call set-up time, or the percent of network represented, as appropriate, for direct access from end offices using SS7-394.

Column (g) - MF - Enter average call set-up time, or the percent of the network represented, as appropriate, for direct access from end offices using multifrequency signaling.

Via Access Tandem - End Offices routing calls through a switch having tandem capability.

Column (h) - SS7-394 - Enter the average call set-up time, or the percent of the network represented, as appropriate, for end office routing calls through tandem switches using SS7-394.

Column (i) - MF - Enter the average call set-up time, or percent of the network represented, as appropriate, for end offices routing calls through tandem switches using multifrequency signaling.

Column (j) - Mixed - Enter the average call set-up time, or percent of the network represented, as appropriate, for end offices using multifrequency signaling, routing calls through an access tandem switch using SS7-394 signaling.

Table IV

Column (k) - Total Study Area - See description for Table I, column (a).

CERTIFICATION

I certify that I am an officer of _____: that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

C. Data Entry Conventions

1. If an entry is to be a subtraction, indicate so by placing a minus sign in the column immediately preceding the numeric data, e.g. use -4, NOT - 4 or (4).

2. Begin each data record in column 1 and make each record the proper length as specified in the accompanying record layouts. Commas are used as delimiters between fields. All numeric fields are right justified and space filled, e.g. use ____123, NOT 123____. All non-numeric fields are enclosed in double quotation marks and are left justified and space filled within these quotation marks, e.g. use "John Doe ____".

3. Give each record a unique record number, beginning with 1001 and incrementing by one, with no numbers skipped.

4. Do NOT include "$" or "%" or embedded commas in any numeric data fields, use the decimal point for percentage amounts.

5. In any numeric data field designated by N/A, enter -99999. If a "Public Version" diskette is filed, enter -88888 in any numeric data field for which data are "Withheld". Enter -77777 in any numeric data field which the reporting carrier designates as "Irretrievable". The reporting carrier must enter explanatory footnotes for all -77777 designated items. **DO NOT** override N/As. If a reporting carrier wishes to apply data to a field containing an N/A, the carrier should enter as a footnote to the field, the amount(s) and an explanation. These entries should be formatted according to the format rules for the particular data field; e.g., -99999 would be entered as -99999.00 in the percentage fields.

6. The date and time of the downtime reported on Table 4A, should be enclosed in double quotation marks and left justified, e.g., date entered as "mmddyy"; time using the 24 hour clock for carriers local time entered as "hhmm" (12:00 midnight entered as "2400")

7. Filing carriers are **NOT** permitted to enter additional designators. All fields must be populated. If the number in a certain field equals the mathematical quantity zero, the zero must be entered in that field.

D. Rounding Conventions

1. All percentage amounts must be entered in percent and rounded to two decimal places.

2. All minutes, days and average intervals (in hours) must be rounded to the nearest tenth.

3. All number of access lines must be rounded to the nearest thousand, with the exception of table IV.A which must be entered in whole numbers.

4. All number of orders, circuits, trouble reports, no trouble found, trunk groups, switches and complaints must be entered in whole numbers.

5. All other amounts must be rounded to the nearest thousand.

RECORD TYPE M1 -
OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME DATA RECORD

Field	Item	Example	Position	Description
1	Record Number	1027	1-4	The sequential number of this record within this data file plus 1000. Format: right justified and space filled.
2	COSA	"LBIL"	6-11	The COSA code for the filing entity. Format: include quotation marks.
3	Record Type	"M1"	13-16	Always contains the letter M capitalized and the number 1 with no space between them. Format: include quotation marks.
4	Row Number	220.0	18-23	Valid range: 220.0 to 319.0. Format: right justified and space filled.
5	Column (t) data	"01" - OR - "0 "	25-28	This field contains the data corresponding to column (t) as shown on the attached list of codes for each condition that causes downtime. Format: left justified and space filled. All fields must be populated. If there are no data applicable to a field enter zero. Include quotation marks.
6	Column (u) data	"ARABALXADSO" (spaces until pos. 60) -OR- "0 "	30-42	This field contains the data corresponding to column (u) as shown on Pages 7-9 and 18 of the accompanying Report Definition. Format: left justified and space filled. All fields must be populated. If there are no data applicable to a field enter zero. Include quotation marks.
7	Column (v) data	2317	44-52	This field contains the data corresponding to column (v) as shown on Pages 7-9 and 18 of the accompanying Report Definition. DO NOT override designated N/As. Format: right justified and space filled. Enter -99999 in integer rows and -99999.0 in percentage rows where a field is designated by N/A. DO NOT use additional designators. All other fields must be populated. If there are no data applicable to an open field enter zero. Enter -88888 in integer rows and -88888.0 in percentage rows on the "public version" diskette to indicate that confidential treatment has been requested. Enter -77777 in integer rows and -77777.0 in percentage rows where data for a field are Irretrievable.

RECORD TYPE M1 -
OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME DATA RECORD(cond't)

Field	Item	Example	Position	Description
8	Column (w) data	"Y" -OR- "N"	54-56	Column (w) data Always contains the letters Y or N capitalized. Format: If there is no data applicable to to this field enter zero. Include quotation marks.
9	Column (x) data	5.5	58-66	Column (x) data Format: see Field 7 above.
10	Column (xx) data	"mmddyy" -OR- "0 "	68-75	Column (xx) data Format: see Field 5 above
11	Column (yy) data	"hhmm" -OR- "0 "	77-82	Column (yy) data Use the 24 hour clock for carriers local time Format: see Field 5 above
12	End of Record Code	"XQ"	84-87	Always contains the letters XQ capitalized with no space between them to indicate the end of the record. Format: include quotation marks.

Note: All fields are separated by commas

Footnote records are needed if any data for the current period differ materially from that for the previous period or the corresponding period of the preceding year and the difference is not self-explanatory but was caused by unusual circumstances that have not been explained in a previous report, if the carrier does not follow the procedures described in the row/column instructions in the accompanying Report Definition, or if the filing carrier has a waiver, the data are lost, or the data cannot be produced at the time of the filing. Add one or more Type F3 records (after the remaining Type M1, G1 and C5 records) containing footnote text to explain the specific circumstances.

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        1         2         3         4         5         6         7         8
12345678901234567890123456789012345678901234567890123456789012345678901234567
Sample records:
1027,"LBIL","M1", 220.0,"09","ARABALXADSO",     2317,"Y",      5.5,"092492","2400","XQ"
1028,"LBIL","M1", 221.0,"13","ANTNALMT23E",        1,"N",     89.0,"100492","1400","XQ"
1029,"LBIL","M1", 222.0,"0 ","0          ",        0,"0",      0.0,"0      ","0   ","XQ"
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